Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

PAUL M. PERRONE AND DORIS MCCULLOUGH,
Individually and on behalf of others similarly situated,
Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

MICHAEL H. ELLIS
Counsel of Record
GEORGE B. RECILE
PAULA A. PERRONE
CHEHARDY, SHERMAN, ELLIS,
BRESLIN & MURRAY
1 GALLERIA BLVD., STE. 110
METAIRE, LA 70001
(504) 833-5600

RUSSELL J. WEINTRAUB
717 E. DEAN KEETON ST.
AUSTIN, TX 78705-3299
(512) 232-1370

WENDELL H. GAUTHIER
SCOTT LABARRE
GAUTHIER, DOWNING, LABARRE
BEISER & DEAN
3500 N. HULLEN ST.
METAIRE, LA 70002
(504) 456-8600

JONATHAN B. ANDRY
ANDRY & ANDRY
710 CARONDELET ST., 1ST FL.
NEW ORLEANS, LA 70130
(504) 581-4334

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

9000

QUESTION PRESENTED FOR REVIEW

Is proof of detrimental reliance required to recover actual damages under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et seq., and the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667, et seq.?

PARTIES TO THE PROCEEDINGS

Petitioners

Paul M. Perrone and Doris McCullough, individually and on behalf of themselves and others similarly situated. Mr. Perrone and Ms. McCullough have no corporate affiliations.

Gilbert V. Andry, Jr. was originally part of the suit brought in the district court against Respondent. Mr. Andry died while the case was on appeal to the Fifth Circuit, but there was no substitution of parties as one of the other named plaintiffs, Ms. McCullough, was a co-lessee on the lease executed by Mr. Andry.

Although the original complaint was filed by Paula A. Perrone as plaintiff, she was granted leave by the district court to withdraw as plaintiff and become counsel of record.

Respondent

General Motors Acceptance Corporation.

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Paul M. Perrone and Doris McCullough respectfully request that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit on the question before this Court is reported at 232 F.3d 433 (5th Cir. 2000), and is reproduced in App. A at 1a - 15a. The District Court Minute Entry and Order granting plaintiffs' Motion to Certify the Issue of Actual Damages to the Fifth Circuit pursuant to 28 U.S.C. 1292(b) is unreported and reproduced in App. C at 23a - 26a. The Order and Reasons of the District Court granting the defendant's Motion to Clarify the Scope of the Class Relating to the Issue of Actual Damages is unreported and reproduced in App. D at 27a - 36a. The District Court's Order and Reasons granting plaintiffs' Motion for Class Certification is unreported and found at App. F at 40a - 45a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on November 2, 2000. A timely petition for writ of certiorari has been filed with this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The federal statutes involved in the question presented for review are the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et seq., and the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667, et. seq. TILA is found in Title One of the Federal Consumer Credit Protection Act. TILA contains five

chapters; Chapter 5 is the Consumer Leasing Act. The rules which implement the CLA are found in *Regulation M*, commencing at 12 C.F.R. 213. Both the CLA at 15 U.S.C. 1667d(a) and *Regulation M,* 12 C.F.R. 213.1(c), specifically adopted 15 U.S.C. 1640, which is the civil liability section of TILA and which governs the award of actual damages.

STATEMENT OF THE CASE

Suit was brought in the district court by three plaintiffs, consumer lessees, Doris McCullough, Gilbert V. Andry, Jr., and Paul M. Perrone against General Motors Acceptance Corporation ("GMAC"). Gilbert V. Andry, Jr. died while the case was on appeal to the Fifth Circuit; however, there was no substitution of parties as one of the other named plaintiffs, Doris McCullough, was a co-lessee on the lease executed by Gilbert J. Andry, Jr.

Although the original complaint was filed by Paula A. Perrone as plaintiff, she was granted leave by the district court to withdraw as plaintiff and become counsel of record. (App. F. at 44a.) Thus, only Paul M. Perrone and Doris McCullough remain as petitioners.

The consumer lessees sued GMAC both in their individual and representative capacities on behalf of those consumers nationwide who, during the period after August 16, 1996, and prior to January 1, 1998, were parties to a motor vehicle lease agreement with GMAC or to a lease agreement which had been assigned to GMAC and where such leases: (1) were for a scheduled term in excess of four months; (2) primarily for personal, family, or household purposes; (3) for a total contractual obligation up to $25,000.00; and (4) where an "acquisition fee" was paid by and/or was charged the lessee and was not individually

itemized and/or not identified as an "acquisition fee" on the face of the lease agreement.

Petitioners contended that GMAC violated both CLA and TILA by failing to disclose and identify an "acquisition fee" of $400.00, which said fee was a component of every consumer lease with GMAC and was charged at the lease's inception. Petitioners each signed a GMAC standard form contract which made no mention of the "acquisition fee" due at lease signing. Accordingly, they maintained that pursuant to 12 C.F.R. 213.4(g)(2), this fee was required to be disclosed since it was paid by the lessee at the inception of the lease and notwithstanding these clear mandates, GMAC failed to disclose the acquisition fee.

Petitioners sought actual damages, statutory damages and attorneys' fees, both individually and on behalf of a nationwide class and moved for class certification. In its Order & Reasons granting class certification, the district court determined that the "acquisition fee" was charged to the consumers at the inception of the lease. (Certification Order, February 10, 1999, App. F at 42a.)

Two months after the district court certified the nationwide class, GMAC filed a Motion to Clarify the Scope of the Class. (App. E at 37a-39a.) GMAC sought to exclude from the Class Certification Order all consumer claims for actual damages. Specifically, in its Motion to Clarify, GMAC argued that a necessary element of an actual damages claim under TILA was proof of "detrimental reliance" and because proof of such reliance must be determined on a case specific or individual basis, such claims were inappropriate for class action treatment.

Petitioners argued that requiring the consumer lessee to prove "reliance" upon information deliberately withheld, *i.e.*, non-disclosed, would impose a burden virtually impossible to meet. They further contended that it would also significantly undermine the remedial purpose for which TILA/CLA was originally passed and would permit GMAC to successfully perpetrate and financially profit from a nationwide pattern and practice of withholding consumer credit information mandated by TILA/CLA.

On July 15, 1999, the district court granted GMAC's motion on the issue of actual damages, finding that in order to recover actual damages, detrimental reliance must be proven, and accordingly, the district court decertified the class action as to actual damages. (App. D at 27a-36a.)

In response to the district court's July 15, 1999 Order, the petitioners filed a Motion for Final Judgment pursuant to Fed.R.Civ.P. 54(b) and/or in the Alternative, for an Interlocutory Appeal. (App. B at 16a-18a.) This resulted in the July 30, 1999, § 1292(b) Order (App. C at 23a-26a) wherein the district court granted the petitioners' motion for an interlocutory appeal to the Fifth Circuit on the question of whether detrimental reliance must be proven to recover actual damages for a disclosure violation.

The district court found that there were substantial grounds for difference of opinion on the issue of actual damages: there was little case law on the issue, with none of it controlling in the Fifth Circuit and the comments of lawmakers from the floor supported each of the parties' claims. (July 30, 1999, § 1292(b) Order, App. C at 25a.) The district court also noted that GMAC agreed that certification was warranted. (July 30, 1999, § 1292(b) Order, App. C at 24a.)

The Fifth Circuit Court of Appeals heard oral argument on the question on July 10, 2000. On November 2, 2000, the Fifth Circuit agreed with the district court that detrimental reliance is an element of a claim for actual damages arising under TILA and CLA. From that decision, petitioners file this writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER DETRIMENTAL RELIANCE MUST BE PROVEN IN ORDER TO RECOVER ACTUAL DAMAGES

The Fifth Circuit decision sought to be reviewed conflicts with decisions of other circuits and is also erroneous for the reasons discussed at Section III below. To add to the confusion, on both sides of the issue, although certain circuits may agree with one another about the end result, there has been little consistency in their methodology of approach.

Since the Fifth Circuit decision in the instant case, the Eleventh Circuit in *Turner v. Beneficial Corp.*, ___ F.3d ___, 2000 WL 1868152, C.A. 11 (Ala.) 2000, a three-judge panel ruled, on December 21, 2000, that in applying the law of its Circuit, proof of detrimental reliance was not necessary in order to recover actual damages. Shortly thereafter, on January 3, 2001, the Eleventh Circuit *en banc* in *Turner v. Beneficial Corp.*, ___ F.3d ___, 2001 WL 7518, C.A. 11 (Ala.) 2001, vacated the three-judge panel's decision on its own motion and ordered counsel in that proceeding to file briefs. The matter has not yet been heard.

The Eleventh Circuit's *en banc* determination to hear the *Turner* case only underscores that the issue brought before

this Court is one of exceptional importance and that the judiciary is in conflict (within and without their respective circuits) as to how the question should be resolved. Therefore, it is not only timely, but essential, that this Court step in to insure that TILA's statutory integrity be preserved.

In sum, either the circuit courts have addressed the issue of detrimental reliance in such a piecemeal fashion or are in such a state of conflict from within, that no crystallized precedent has emerged on which the district bench, the bar or the public may rely. While a handful of district court and bankruptcy decisions have articulated a well-reasoned approach consonant with TILA's remedial purpose and its express statutory language, these decisions do not have the weight of binding authority, and as such, the circuit courts have felt free to ignore them.

The Fifth Circuit did just that in its decision below. It rejected the thoroughly-reasoned decision of *In Re Russell*, 72 B.R. 855 (E.D. Pa. 1987), which carefully analyzed TILA's statutory framework in light of its legislative history, the Act's amendments and TILA's remedial purpose and rejected the notion that detrimental reliance must be proven in order to recover actual damages under TILA. In its eagerness to reject *In Re Russell*, the Fifth Circuit chose a path which not only did violence to the statute, rendering key provisions therein meaningless or absurd, it also disregarded this Court's imperatives regarding the canons of statutory construction.

Although the Fifth Circuit claimed to base its decision in part on the Eighth Circuit decision in *Peters v. Lupient*, No. 99-2783, 2000 WL 1133841 (8th Cir. 8/11/00), the detrimental reliance issue was only cursorily discussed in *Peters* because the consumer in that case did not contest the district court's finding that proving detrimental reliance was

a prerequisite to recovery of actual damages. This issue alone makes *Peters* an extremely weak case for the Fifth Circuit to rely upon; however, the majority opinion in *Peters* presents with other flaws as well, all as set forth in its dissent.

The dissenting judge in *Peters* criticized the majority's opinion as inconsistent with TILA and with prior decisions of the Seventh Circuit in *Gibson v. Bob Watson Chevrolet-GEO, Inc.*, 112 F.3d 283, 285-87 (7th Cir. 1997). The *Peters* decision, and now the Fifth Circuit's decision in this case, both conflict with two other Eleventh Circuit cases, that of *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1363 N.7 (11th Cir. 2000) and the earlier Eleventh Circuit case of *Ransom v. S&S Food Center, Inc. of Florida,* 700 F.2d 670 (C.A. 11th 1983).

The *Jones* decision recognized that TILA liability was based upon the failure to disclose information required to be disclosed; there was no requirement that the plaintiff himself be deceived. Admittedly, both *Jones* and *Ransom* issued terse holdings regarding the detrimental reliance issue, which has contributed to the chaos. Yet the Fifth Circuit herein fared no better by claiming to anchor its philosophical moorings to the Eleventh Circuit's decision in *Adiel v. Chase Federal Savings & Loan Association*, 810 F.2d 1051 (11th Cir. 1987).

The Eleventh Circuit in *Adiel* only affirmed the district court's award of statutory damages, simply stating that the district court did not abuse its discretion in awarding statutory damages. It did not comment on the necessity of causal nexus or proof of detrimental reliance. Such a limited holding cannot support the imposition of detrimental reliance. Further, *Adiel* did not reference, one way or the other, its earlier holding in *Ransom, supra.*

Thus, as of this writing, the Fifth, Seventh, Eighth and Eleventh Circuits are all sending mixed messages to the various district courts throughout the country, mandating certiorari herein. Litigants in Louisiana should not be subjected to a different causation burden under TILA than litigants in New York, California or elsewhere.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

The rule of law sought to be reviewed is of exceptional importance: it will absolutely and unequivocally be determinative of a consumer's right to sue for actual damages under TILA by way of class action. If the detrimental reliance requirement imposed by the Fifth Circuit upon all consumers who seek actual damages is not reversed, then that requirement will eliminate all class actions for actual damages under TILA, contravening the statute's plain language and remedial purpose.

The Fifth Circuit's decision, if left to stand, will have a devastating effect upon TILA's ability to protect the consumer from inaccurate and unfair credit practices. The practical effect of this Fifth Circuit ruling eliminates all class actions for actual damages, leaving only statutory damages capped at $500,000.00 in class actions. Without class actions for actual damages, TILA's status as a private attorney general enforcement tool will be shattered. A $500,000.00 cap on exposure for any single disclosure violation will not deter consumer creditors, like GMAC, from engaging in widespread loan-packing practices involving millions of dollars.

For example, GMAC has admitted that the alleged disclosure violation complained of herein, the non-disclosure

of the "acquisition fee," involves several hundred million dollars. *See,* Fifth Circuit decision of November 2, 2000, App. A at 3a. If GMAC's maximum exposure is left at only $500,00.00 in statutory damages to the class, and there can be no actual damages awarded to the class because of the detrimental reliance requirement, then what incentive does GMAC ever have to "self-police" under 15 U.S.C.§ 1640(b)?

Consumers do not arrive at the automobile dealership with slide rule and amortization schedules in hand. By tacking on an undisclosed "acquisition fee," GMAC has allegedly engaged in a "loan packing" practice and should not be permitted to hide behind a "detrimental reliance" shield. See, Keest, "Recent Developments in Automobile Lending: Hot Spots"(1998)(WESTLAW "TP-ALL" at "1048 PLI/Corp 527"), wherein the author states that if a court accepts the reliance argument, "the court must then be prepared to deal with the absurd result that the more successful a deceptive loan packing sales practice, the more the offending dealer has insulated itself from TILA liability. That is hardly an interpretation of Truth in Lending consistent with its purpose of encouraging honesty in the marketplace and protecting consumers." *Id.* at 533.

The fear of apprehension and compulsory restitution in the form of actual damages payable to an entire class of consumers is the deterrent which keeps creditors in compliance. As stated above, the more clever a loan-packing practice becomes, there will be fewer and fewer consumers who will uncover it. The possibility that a creditor may be sued by a nominal number of individuals for actual damages has no impact whatsoever. The exposure for class-wide liability as to statutory damages, now capped at $500,000.00, pales in comparison to the financial advantages gained by

evading TILA mandates. Class actions for actual damages are the only effective means of achieving widespread compliance.

Moreover, in 1968 when TILA was first enacted, consumer credit was in its infancy. Now, it is a multi-billion dollar a year industry. Thus, the powerful deterrent effect of class actions for actual damages must not be eviscerated at a time when consumer credit has become a way of life for most Americans. To do so would give consumer creditors *carte blanche* to ignore TILA's disclosure requirements. This Court must not permit such a result.

III. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS ERRONEOUS

The Fifth Circuit's opinion erroneously raises the consumer's burden of proof regarding "injury-in-fact" to that required in a fraud or misrepresentation action, the highest burden of proof existent in the law. This defeats the remedial purpose of the statute and defies well-established principles of statutory construction.

Petitioners advanced the argument in the lower courts that detrimental reliance is not necessary in order to recover actual damages in a TILA class action because the statute provides for a remedy of restitution, a remedy which restores the plaintiff to the position he would have been in had it not been for the defendant's wrongdoing.

Alternatively, petitioners argued that actual damages under TILA could be recovered pursuant to the law of contract, thereby obviating the need for proof of detrimental reliance. Additionally, petitioners claimed that if detrimental reliance were the burden imposed by the court, then they should be entitled to avail themselves of the rule in *Affiliated*

Ute Citizens of Utah v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed. 2d 74 (1972) -- where there is a duty to disclose and a material omission, reliance is presumed. Those three arguments are reiterated herein. If this Court were to grant certiorari, and find some form of "causal link" necessary to recover actual damages, then petitioners would urge application of their alternative positions found below.

There is absolutely no requirement under TILA to prove intent, motive, fraud, or misrepresentation. TILA is a strict liability, remedial statute. Civil liability is imposed when a violation occurs. *See, Thomka v. AZ Chevrolet, Inc.*, 619 F.2d 246 (3rd Cir. 1980); *LaPetina v. Metro Ford Truck Sales, Inc.*, 648 F.2d 283 (5th Cir. 1981), "TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made"; *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3rd Cir. 1990); *Brophy v. Chase Manhattan*, 947 F.Supp. 879 (E.D. Pa. 1996); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); *Williams v. Rizza Chevrolet-Geo, Inc.*, 2000 WL 263731, *3 (N.D. Ill. 2000).

Petitioners submit that the Fifth Circuit's opinion does irreparable harm to TILA consumers and conflicts with other circuits. As such, this Petition for Writ of Certiorari will focus upon five key errors contained in the Fifth Circuit's opinion which amply demonstrate that its decision did not properly take into account TILA precedent as well as this Court's myriad yet consistent holdings in the areas of causation, statutory construction, restitution/unjust enrichment and contract law.

This Court must grant certiorari due to the fact that these same five errors, in whole or in part, echo throughout TILA case law, creating a cascade of ill-reasoned precedent

which holds that detrimental reliance is required in order to recover actual damages under TILA. These erroneous rulings also conflict with the circuits which hold that detrimental reliance is unnecessary.

FIRST: The Fifth Circuit failed to analyze the causation issue in light of the fact that TILA is a strict liability, remedial statute and erroneously determined that the language "as a result of" found at 15 U.S.C. § 1640(a)(1) meant that the consumer was required to prove "detrimental reliance." The plain language of the statute, "any creditor who fails to comply . . . is liable" imposes strict liability:

> § 1640. Civil liability [TILA § 130]
>
> (a) Individual or class action for damages; amount of award; factors determining amount of award
>
> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . is liable to such person in an amount equal to the sum of
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A)(i) in the case of an individual action, ... (statutory damages provision) . . .

There are only two ways to avoid liability under TILA, the affirmative defenses of "self-correction" and "bonafide error." Only the "self-correction" defense found at 15 U.S.C. § 1640(b) is at issue here. Under this provision, a creditor can avoid *civil liability* under TILA if it voluntarily notifies the consumer within sixty days following the discovery of the error and makes whatever adjustments in the

appropriate account are necessary to assure that the consumer would not be required to pay an amount in excess of the charge actually disclosed. 15 U.S.C. § 1640(b). This "correction of errors" provision imbedded into TILA clearly envisions the creditor making restitution to the consumer of any undisclosed charges which were required to be disclosed.

This self-policing mechanism was designed as an affirmative defense, not as a mere suggestion to creditors that if they wished to be good corporate citizens, they could return to the consumer the amount in excess of the charge actually disclosed. In this case, however, GMAC did not avail itself of the "self-correction" defense and should not be allowed to evade TILA's strict liability as to all actual damages under the statute, including those actual damages as to the class.

Since TILA is a strict liability statute, there should be a dispensation of the injury-in-fact/cause-in-fact question regarding causation. Interestingly, in prior decisions the Fifth Circuit has held that when a statute creates strict liability, there is generally a dispensation with the injury-in-fact/cause-in-fact question. *See, Uniroyal Chemical Co., Inc. v. Deltech Corp.*, 160 F.3d 238 (5th Cir. 1998); *OHM Remediation Serv. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, at 1578 (5th Cir. 1997). Yet that same principle was not applied to the instant case when it came before the Fifth Circuit.

At the very least, even if there is no dispensation with the injury-in-fact/cause-in-fact inquiry, the affirmative defenses found in the statute provide the basis upon which to shift the burden to the defendants to disprove causation. Fifth Circuit Judge Jolly, commenting on the strict liability aspect of CERCLA, wrote, "Congress has, therefore, allocated the burden of disproving causation to the defendant..." *Bell Petroleum v. Sequa Corp.*, 3 F.3d 889, 893

[FN 4.] (5th Cir. 1993), citing *U.S. v. Monsanto Corp.*, 858 F.2d 160, 170 (4th Cir. 1998).

This interpretation regarding proof of causation is not only in keeping with the remedial purpose of TILA and its express "self-correction" language found at §1640(b), it is also consonant with this Court's pronouncement regarding remedial statutes. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427, 62 U.S.L.W. 4609 (1994), Justice Thomas stated:

> We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific Rail Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) that a relaxed standard of causation applies under FELA.

There must be a consistent application of the *Consolidated Rail Corp.* rule of liberal construction; the relaxed standard of causation should also apply to TILA in those instances where a "causal link" must be established.

As is demonstrated by the case law, the question of causation necessarily incorporates two components: (1) injury-in-fact (also referred to as cause-in-fact), as illustrated above, and (2) foreseeability or legal cause. Once the injury-in-fact determination has been made (either by relaxing of/dispensing with causation altogether or by shifting the burden), then the inquiry turns to foreseeability or legal cause, involving liability limitations and "direct" versus "remote" damage issues.

In her concurring opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687,

115 S.Ct. 2407, 132 L.Ed.2d 597 (1995), a case which interpreted the Endangered Species Act (a strict liability statute), Justice O'Connor determined that the language "by reason of" imposed a limit on the extent of liability, or recovery of, *i.e.*, "direct" versus more "remote" damages. She referenced the case of *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 - 808 (9th Cir. 1992), which case held that the language "as a result of" in the Trans-Alaska Pipe Line Authorization Act (a strict liability statute) limited proximate cause so as to not reach "remote" and "derivative" consequences.

Thus, the phrase "as a result of" found at 15 U.S.C. § 1640(a) is of critical importance. Since TILA as a strict liability statute sets forth affirmative defenses, the burden of proving causation must either be dispensed with in its entirety or the burden of disproving causation must be shifted to the defendants once a violation is alleged. Likewise, per Justice O'Connor's concurring opinion in *Babbitt,* there is a trade-off in imposing strict liability under TILA. The extent of liability, *i.e.*, the foreseeability component of causation, is restricted to "direct" rather than "consequential" damages. The TILA language, "as a result of," cannot be interpreted as requiring proof of detrimental reliance under Justice O'Connor's rationale in *Babbitt*; rather, it must be interpreted as simply limiting the consumer's actual damages to "direct" as opposed to "consequential" damages.

Black's Law Dictionary (6th Ed. 1990) defines "direct damages" as those which "as follow immediately upon the act done" where "consequential damages" are "such damage, loss or injury as does not flow directly and immediately from the act . . . " It is readily ascertainable from the statute, on its face, as to what actual damages are "foreseeable" or "direct." Under § 1640(b), the creditor is required to make "whatever

adjustments in the appropriate account as are necessary to assure that the consumer would not be required to pay an amount in excess of the charge actually disclosed."

Accordingly, if a consumer paid any amount in excess of the charge actually disclosed, then this excess payment would flow directly and immediately from the creditor's act, that of noncompliance with TILA regulations. The actual damage to the consumer is foreseeable and direct: he paid an amount in excess of the charge actually disclosed. Furthermore, the statute spells out the remedy: the creditor must make the appropriate adjustments in the consumer's account (restitution) "to assure that the consumer would not be required to pay an amount in excess of the charge actually disclosed." § 1640(b).

Thus, the language "as a result of" does not require proof of detrimental reliance; the Fifth Circuit was plainly wrong in so ruling.

SECOND: The Fifth Circuit erroneously imposed the burden of detrimental reliance upon TILA consumers, a burden reserved for plaintiffs seeking damages for fraud or misrepresentation. The detrimental reliance burden is also imposed so as to limit damages in cases sounding in contract where there is no consideration, as in a promissory estoppel claim. *See, Petrofsky v. U.S.*, 488 F.2d 1394 (Ct. Cl. 1973). This heavy burden does not apply to TILA consumers and should not have been applied in the instant case.

Assuming for the moment that this Court were to reject its previously expressed position that a strict liability statute dispenses with or relaxes the cause-in-fact requirement, or to find that TILA did not impose strict liability upon creditors, detrimental reliance would still not be the rule. Any

"but for" test which this Court would then seek to impose upon TILA consumers must be a cause-in-fact requirement founded only in negligence or mistake.

This "but for" test under TILA is very straightforward: the language of TILA found at § 1640(b) plainly demonstrates that the defendant's act of non-disclosure will have a strong propensity to cause the type of injury complained of herein, that of being charged an amount in excess of that which was disclosed. That very causal tendency establishes a *prima facie* case of cause-in-fact and the burden should then shift in these cases to the creditor defendant. *Liriano v. Hobart Corp.*, 170 F.3d 264 (2nd Cir. 1999).

In the past, this Court has applied the cause-in-fact requirement in the context of an antitrust injury, simply inquiring whether the injury alleged by the plaintiff "resembles any of the potential dangers" which lead the Court to label the defendants' alleged conduct violative of the antitrust laws in the first instance. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328. 341, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). *See also, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 1572, at *n.* 9, 23 L.Ed.2d 129 (1969).

Other analogous case law in the area of antitrust (remedial legislation) has analyzed cause-in-fact as "an injury of the type the antitrust laws were intended to prevent and that flows from that which make defendants' acts unlawful." *See, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 107 (1977); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed 2d. 149 (1982); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed. 2d 723 (1983).

Likewise, this Court can easily fashion the same rule for TILA plaintiffs that it has fashioned for antitrust plaintiffs over the years: does the injury alleged resemble any of the potential dangers which lead the Court to label the defendant's alleged conduct violative of the TILA disclosure laws in the first place? If so, then a *prima facie* case of cause-in-fact has been established. In many TILA cases, the injury alleged would often resemble the potential danger of being charged for that which was not disclosed pursuant to the statute's requirements.

This Court has carefully crafted jurisprudential guideposts over the past century which make it unequivocally clear that a defendant cannot avoid liability for his wrongdoing by attempting to impose evidentiary roadblocks to thwart the wronged party. *See, Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed.2d 684 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Hetzel v. Baltimore & Ohio Rail Co.*, 169 U.S. 26, 38, 39, 18 S.Ct. 255, 259, 260, 42 L.Ed. 648 (1898); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 56 S.Ct. 574, 90 L.Ed. 652 (1946). This Court has repeatedly implemented common-sense rules which have fairly and equitably allocated the burdens of proof. It must do so herein so as to prevent the concept of "detrimental reliance" from being used as an evidentiary roadblock to thwart TILA class actions for actual damages.

THIRD: The Fifth Circuit wrongly rejected this Court's reasoning in *Affiliated Ute Citizens of Utah, supra*, as an appropriate analog in TILA cases. This Court's holding in *Affiliated Ute* provides for a presumption of reliance when there is a duty to disclose and where there has been a material omission. Petitioners continue to maintain that detrimental

reliance is the wrong burden to apply; nonetheless, if that is the burden which this Court ultimately imposes, then the TILA consumer must be allowed to assert the *Affiliated Ute* presumption of reliance, at the very least.

The Fifth Circuit's rationale for disregarding this argument (App. A at 14a) was that, "unlike 10(b)(5), the roots of Truth in Lending are not in protection against common law fraud," [citing *McCoy v. Salem Mortgage*, 74 FRD 8, 13 (ED Mich. 1976)]. There are two problems with this line of thinking: one, if the roots of Truth in Lending are not in protection against common law fraud, a consumer should not be held to the same burden of proof (detrimental reliance) which exists in a common law fraud case; and two, the *Affiliated Ute* presumption of reliance rule is codified in the *Restatement of the Law, Second, Torts* at § 551 to apply universally, not just in 10(b)(5) or other securities law cases. Therefore, the consumer in a TILA actual damages case must be entitled to such a presumption, if detrimental reliance is the burden this Court would ultimately impose.

Further, as this Court made absolutely clear in *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 376, 93 S.Ct. 1652, 1664, 36 L.Ed. 2d 318(1973), TILA "reflects a transition in Congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'" 411 U.S. at 377, 93 S.Ct. at 1664. TILA's legislative purpose as set forth in *Mourning* is identical to the one underlying the Securities Exchange Act, as the Supreme Court explained in *Affiliated Ute* only one year earlier: "the 1934 Act and its companion legislative enactments embrace a fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *Affiliated Ute*, 406 U.S. at 151, 92 S.Ct. at 1471.

It is this commonality of legislative purpose mandating full disclosure that makes it appropriate for this Court to apply the *Affiliated Ute* presumption (which was devised to solve the proof problems inherent in securities nondisclosure cases) to TILA nondisclosure cases.

In addition to declining to extend this Court's holding in *Affiliated Ute* to TILA cases, the Fifth Circuit also rejected the rationale of *In Re Russell, supra*, a TILA case which discussed material/substantial violations under the Act. *In Re Russell* articulated the test for actual damages as one where there has been a "substantial" violation under TILA, as opposed to a "technical" violation. The Fifth Circuit, App. A at p.10a-11a,dismissed this analysis, claiming that it would call upon the court to differentiate between "technical" and "substantial" violations and to do so would "mark a radical departure from established Truth in Lending case law." This is patently incorrect.

TILA contains a specific provision, §1635, which grants the consumer a right to rescind a credit transaction when such transaction involves a security interest on a consumer's home and the disclosure violation is a "material" one.

The Fifth Circuit more than twenty years ago in *Bustamante v. First Federal Savings & Loan Assn. of San Antonio,* 619 F.2d 360 (5th Cir. 1980) delineated what were substantial"/"material" violations and what were "technical" violations under §1635 of the Act. Yet the Fifth Circuit in the instant case chose to ignore its own jurisprudence. The *Bustamante* test is an objective, not subjective one, thereby eliminating any need for individualized proof.

Although the recission remedy afforded to consumers under §1635 is admittedly not at issue in this case, the *Bustamante* decision does provide important insight into the policy considerations militating against imposition of a detrimental reliance requirement. The *Bustamente* plaintiffs sought recission of a loan on the grounds that the lender incorrectly disclosed the annual percentage rate. The lender's defense was that the nondisclosure was not "material." The *Bustamante* court rejected that argument, stating:

> First Federal argues that the omission of the APR was not material because the Bustamantes did not attempt to shop around for better credit rates and therefore, they were not concerned with the APR. Even if this assessment of the Bustamantes' attitude is correct, to apply a subjective standard to the test for materiality would misperceive the remedial purpose of the Act. To apply a subjective standard would be to protect only the sophisticated credit shopper; such a standard would fail to protect the unsophisticated or uneducated consumer or redress violations of the Act, and would not promote the informed use of credit. *See, Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980) (well-settled that an objective standard is used in determining violations of the TILA; it is not necessary that the plaintiff consumer actually have been deceived for there to be a violation). *Bustamante* at p.364.

Accordingly, the rejection of the *Affiliated Ute* presumption of reliance by the Fifth Circuit is unwarranted.

FOURTH: The Fifth Circuit erred in failing to recognize that the consumers' cause of action sounds in simple unjust enrichment. GMAC's failure to comply resulted in its unjust enrichment, at the expense of the consumer. The consumer is entitled to restitution without proof of detrimental reliance and without proof of any "causal link."

Restitution has long been recognized as the appropriate method to define actual damages even prior to being included in the Act in 1980. Since the legislative history relates the 1980 administrative restitution provisions to the 1974 actual damages provisions, the restitution provisions are particularly instructional with regard to congressional understanding of the measure of actual damages.

In the period leading to the amendments, at least two Congressional Committee Reports explicitly state that civil liability for actual damages is "the equivalent of restitution adjustments." See, S. Rep. No. 720, 95th Cong., 2d Sess. 12 (1978) and S. Rep. No. 73, 96th Cong., 1st Sess. 13 (1979).

Many courts have held that the statute's restitution guidelines create the proper formula for recovery of actual damages. *In re Russell, supra*; *Ransom v. S & S Food Center, Inc., supra; Lopez v. Orlor, Inc.*, 176 F.R.D. 35 (D. Conn. 1997); *Sutliff v. County Savings and Loan Co.*, 533 F. Supp. 1307 (N.D. Ohio 1982); *Hill v. Allright Mortgage Co. (In re Hill)*, 213 B.R. 934 (Bankr. D. Md. 1996), *aff'd* 213 B.R. 943 (D. Md. 1997); *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988); *Preston v. First Bank of Marietta*, 473 N.E.2d 1210 (Ohio Ct. App. 1983); *Swanagan v. Al Piemonte Ford Sales*, 1999 U.S. Dist. LEXIS 11167 (N.D. Ill. 7/8/99).

According to Black's Law Dictionary, (6th Ed. 1990), under Damages, compensatory, "actual damages" are

synonymous with "compensatory damages." Compensatory damages include "damages awarded to a person as compensation, indemnity or *restitution* (emphasis added) for harm sustained by him." The amount of "actual damages" under TILA should thus be provable by determining the loss caused by the creditor's violation, the amount by which the creditor was "unjustly enriched." This is what Congress envisioned when it amended TILA to add restitution enforcement. 15 U.S.C. § 1607.

Petitioners also submit that the overall structure of the statute supports the conclusion that restitution of undisclosed charges without proof of reliance is the proper measure of actual damages under 15 U.S.C. § 1640(a). More specifically, petitioners contend that the self-correction defense to civil liability set forth at 15 U.S.C. § 1640(b) and the agency enforcement actions authorized at 15 U.S.C. § 1607 both demonstrate that TILA embodies restitution as the appropriate measure of damages for violations of the act.

Further, § 1640(b) does not appear in a vacuum, having nothing to do with § 1640(a). The "correction of errors" provision of § 1640(b) is an affirmative defense to an actual damages claim under § 1640(a). Far from being distinct, the two are intrinsically related. Both provisions are subsections of § 1640, which is captioned "Civil Liability." Section 1640(a) provides for private actions to recover actual damages; § 1640(b) provides an affirmative defense to liability imposed by § 1640(a), conditioned upon the restitution of undisclosed charges by the creditor.

Properly understood, the "correction of errors" defense provided in § 1640(b) supports the conclusion that restitution is the measure of actual damages under § 1640(a). The defense is expressly predicated on the restitution of

undisclosed charges. No lender or lessor would avail himself of a defense to liability that required him to pay more as part of the defense than he could ultimately be held liable for in the first instance. The scope of the defense under § 1640(b) must mirror the extent of potential liability under § 1640(a), or the statute is rendered absurd. It therefore follows that, because restitution is the basis of the defense to civil liability under § 1640(b), restitution is also the measure of actual damages for civil liability under § 1640(a).

Thus, this interpretation "can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 1 L.Ed. 2d 331 (1957); *C.I.R. v. Engle*, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed. 2d 420 (1984).

Given this restitutionary scheme, it is appropriate to examine this Court's pronouncements in the area of unjust enrichment/restitution [*See, Louisiana v. Thomas J. Wood,* 102 U.S. 153, 12 Otto 294 (1880)], tortious conversion [*See, Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed 288 (1952)] and rate/tariff cases [*See, Bull v. United States,* 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935); *Meeker v. Lehigh Valley Ry. Co.,* 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644 (1915)]. In none of these cases do the terms "injury-in-fact" or "cause-in-fact" appear. This is because this Court historically has focused its inquiry upon the defendant's wrong-doing and upon fashioning a remedy which would restore the plaintiff to the position he or she would have been in had it not been for the defendant's wrongful acts. This Court should not change its course when interpreting TILA.

The Fifth Circuit (App.A at 12a-13a) interpreted 15 U.S.C.§ 1640(b), the self-correction provision, as a mere self-policing mechanism with no apparent function other than to encourage "prompt, prophylactic cure of disclosure violations." Such a conclusory statement ignores economic reality as well as the structure and placement of § 1640(b) in relation to § 1640(a) as discussed above.

If the Fifth Circuit's decision stands, the self-correction provision, clearly an affirmative defense to absolute liability, will be rendered superfluous and meaningless. No court may choose to interpret one provision in a law in such a way as to render another provision meaningless when there is a way to give effect to both. In construing a statute, a cardinal principle is to preserve the entire statute and accord each word and clause effect. *See, Director, Office of Workers' Compensation Programs, U.S. Dept. Of Labor v. Goudy*, 777 F. 2d 1122 (6th Cir. 1985); C. Sands, *Sutherland's Statutory Construction*, 46.06 (4th ed. 1973). "Ordinarily, we avoid treating statutory language as surplusage." *See, State Fair of Texas v. U.S. Consumer Product Safety Commission*, 650 F.2d 1324, 1330 (5th Cir. 1981).

Likewise, if the Fifth Circuit's decision is allowed to stand, the TILA paragraph following § 1640(a)(4), reproduced below, will also be rendered meaningless:

> In determining the amount of award in any class action, the court *shall* (emphasis added) consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failure of compliance by the creditor, the resources of the creditor, the number of parties adversely

effected and the extent to which the creditors failure of compliance was intentional.

This provision mandates the courts, in making a determination of an award of statutory damages in a class action, to consider the amount of any actual damages awarded to the class. The plain language of the statute clearly indicates that class actions for actual damages must exist: it cannot be read in any other way. If detrimental reliance is required to prove actual damages, then *no class action* can ever be maintained for actual damages.

Where the language of a statute is plain, the duty of the court is to enforce it according to its own terms. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed. 2d 290 (1989). It is "the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 574, 116 L.Ed.2d 578, 586 (1991). *See also, McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194, 200 (1991).

The Fifth Circuit's ruling eliminates all class actions for actual damages in contravention of the plain language of the statute, rendering entire provisions meaningless or absurd. This cannot lie.

FIFTH: The Fifth Circuit erred in not applying principles of contract law herein. This would have eliminated the "detrimental reliance" burden in its entirety and allowed TILA consumers to recover actual damages under a "benefit of the bargain" analysis.

Where agreements are supported by adequate consideration, there is no need to rely on notions of detrimental reliance. *See, FDIC v. Patel*, 46 F.3d 482 (5th Cir. 1995); *Mills v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 305 (8th Cir. 1983); Restatement (Second) of Contracts, Sec. 90 (1981). Leading contract authorities emphasize this pure expectancy recovery without any element of reliance. *See,* 5 Arthur Corbin, Contracts § 992 at p. 5 (1964).

While TILA provides for civil liability under 1640(a), it does not specify that an aggrieved consumer must sue in tort. When a statute sets forth liability but does not specify the remedy, an aggrieved party can sue under any theory of recovery in the common law. *United States v. Kaufman*, 96 U.S. 567, 6 Otto 567, L. Ed. 792 (1877); *Pollard v. Bailey*, 87 U.S. 520, 22 L. Ed. 376, 20 Wall. 520 (1874).

In enacting TILA, Congress clearly did not intend nor did it fundamentally change in any way the traditional notions of contract law. TILA did, however, require that the contracts conform to the disclosure dictates of the Act, thereby imposing civil liability upon the creditor for disclosure violations. These disclosure requirements are not mere ornaments; they form part of "the regime of common and statutory law" upon which a contract depends for its effectiveness and enforcement. *Norfolk & Western Railway Co. v. American Train Dispatchers' Assoc.*, 499 U.S. 117, 129-130, 111 S.Ct. 1156, 113 L.Ed. 2d 95(1991).

Petitioners cited *Norfolk* as authority for the proposition that the issue of proof of actual damages under TILA should be determined by applying principles of contract law. This Court in *Norfolk* held that "laws which exist at the time and place of the making of a contract and where it is to

be performed, *enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms*. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." (Emphasis added).

The Fifth Circuit ignored this Court's holding in *Norfolk* when it rendered its decision. Instead, it chose to misapply the holding in *Sellers v. Wollman,* 510 F.2d 119 (5th Cir. 1975), claiming that *Sellers* stood for the proposition that contract "benefit of the bargain" damages were not allowed under TILA. This avoided discussion of the *Norfolk* decision in its entirety. Giving the petitioners' contract argument short shrift, the Fifth Circuit stated that *Sellers* rejected the proposition that § 1640(a) contained a "benefit of the bargain" remedy for TILA violations; however, at the time the plaintiffs in *Sellers* brought suit, the only TILA remedies available under § 1640(a) were statutory penalties (an amount then equal to twice the amount of the finance charge, with a minimum limit of $100 and a maximum limit of $1,000) and attorney's fees. The right to receive actual damages resulting from the Act's violation was not enacted until 1974. Thus, actual damages did not even exist under TILA when the transactions at issue in *Sellers* occurred.

Accordingly, the only form of damages available to the plaintiffs in *Sellers* under § 1640(a) was, as the Supreme Court recognized in *Mourning, supra*, a civil penalty. The court in *Sellers* was understandably concerned that it would exceed its authority in awarding contract damages under the then-existing statutory scheme: the only damages recoverable were statutory damages of a minimum to maximum dollar range only. Accordingly, the *Sellers* court rejected an award based upon a "benefit-of-the-bargain" analysis because such damages were obviously outside the scope of the statute.

The Fifth Circuit also held that the "benefit-of-the-bargain" argument should be rejected in the instant case because the lessees were not required to pay more than the lease agreement required them to pay, and thus they got the benefit of their bargain. While perhaps superficially appealing, this argument does not hold up under scrutiny. Indeed, under close analysis, it disregards TILA's primary goals of (1) protecting the consumer from inaccurate and unfair credit practices and (2) assuring a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. 15 U.S.C. § 1601(a); *Fairley v. Turan-Foley Imports*, 65 F.3d 475, 479 (5th Cir. 1995).

Per *Norfolk*, every contract governed by TILA/CLA incorporates in its terms the specific disclosure requirements pertaining to that transaction. In the instant case, GMAC was under the statutory obligation to disclose the components of all up-front lease charges yet did not disclose on the lease any component identified as an "acquisition fee." As such, since the terms of GMAC's contract with the consumers did not reveal the up-front fee component, it could not legally add such a component to the contract under TILA/CLA. To do so would deprive the consumer of the benefit of his bargain, that being a contract with no up-front "acquisition fee" charge.

For the above and foregoing reasons, petitioners should be allowed to recover actual damages by way of a class action under a "benefit-of-the-bargain" analysis founded in contract, thereby obviating the need to prove any "causal link," detrimental reliance or "cause-in-fact" injury.

CONCLUSION

The Fifth Circuit has erroneously interpreted the language of § 1640(a), "as a result of," to impose upon the consumer a "but for" causation test, then compounded its error by equating the "but for" test with the requirement of "detrimental reliance." This was done with no citation whatsoever to any authority for such a proposition.

As stated above, the circuits are divided over this critical TILA issue. Class actions for actual damages under TILA cannot and must not be eliminated by the stroke of a pen. Wherefore, petitioners respectfully request that this writ be granted.

Respectfully submitted,

/s/_____

Michael H. Ellis (La. Bar #5334)
Counsel of Record
George B. Recile (La. Bar #11414)
Paula A. Perrone (La. Bar #10518)
Chehardy, Sherman, Ellis,
Breslin & Murray
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
Telephone: (504) 833-5600

Wendell H. Gauthier (La. Bar #5984)
Scott Labarre (La. Bar #17659)
Gauthier, Downing, Labarre,
Beiser & Dean
3500 North Hullen Street
Metairie, Louisiana 70002

Telephone: (504) 456-8600

Russell J. Weintraub
(Tx. # 21098500)
717 East Dean Keeton Street
Austin, Texas 78705-3299
Telephone: (512) 232-1370

Jonathan B. Andry (La. Bar #20081)
Andry & Andry
710 Carondelet Street, First Floor
New Orleans, Louisiana 70130
Telephone: (504) 581-4334

Counsel for Petitioners, Paul M. Perrone and Doris McCullough, individually and on behalf of themselves and others similarly situated

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed November 2, 2000]

No. 99-30958

PAULA PERRONE, Individually and on behalf of others similarly situated; ET AL;
Plaintiffs,

GILBERT V. ANDRY, JR.; PAUL PERRONE; DORIS MCCULLOUGH,
Plaintiffs-Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before POLITZ, JONES and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellants, a class of automobile lessees who brought an action under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., and the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667, against General Motors Acceptance Corporation ("GMAC") have been granted an interlocutory appeal on the question of whether detrimental reliance must be proven to recover damages for a disclosure violation arising under those statutes. 28 U.S.C. § 1292(b). Agreeing with the district court that detrimental reliance is an element of a claim for actual damages, we remand to that court for further proceedings.

I. BACKGROUND

Doris McCullough, Gilbert V. Andry, Jr., and Paul Perrone ("Appellants"), individually and as representatives of a class, sued GMAC for its alleged failure to disclose and identify an administrative/acquisition fee in their pre-printed form contracts for automobile leases. Appellants sought actual damages, statutory damages and attorneys' fees pursuant to the civil liability provisions of CLA and TILA. *See* 15 U.S.C. § § 1640(a)(1),(2), 1667d.

Appellants signed pre-printed form vehicle lease agreements with automobile dealerships that were subsequently assigned to GMAC. They allege that the GMAC leases, used by dealers throughout the country, did not identify an "acquisition fee" of $400 charged by GMAC to the dealer at the inception of each lease. The non-itemization, they contend, violated the CLA and TILA and inflicted damages of $400 per lease.

GMAC responds that because the $400 fee was included in the computation of both the monthly amounts and total payments under the leases, it was sufficiently disclosed. Thus, the appellants knew exactly how much they were paying for their leases at signing and were charged no more than the disclosed amounts. While making the disclosure in question would not have changed either the monthly payment amount or the total payment disclosed in the leases, GMAC adds, the damages sought by the lessees could add up to several hundred million dollars.

The district court certified a class consisting of,

> All natural persons resident in the U.S. who, at any time during the period after August 16, 1996 and prior to January 1, 1998, were parties to a motor vehicle lease agreement with GMAC or a lease which has been assigned to GMAC and whose lease: (1) were for a scheduled term in excess of four months; (2) primarily for personal, family, or household purposes; (3) for a total contractual obligation of $25,000 or less; and (4) wherein an administrative/acquisition fee was paid by and/or was charged the lessee and was not individually itemized and/or was not identified as an administrative/acquisition fee on the face of the lease agreement.

Subsequently, the court granted GMAC's motion to clarify the scope of the class regarding actual damages. Finding that "in order to prove actual damages, [each] plaintiff must prove detrimental reliance," the court then declined to certify the

Appellants' class action as to the actual damages claim. A request for certification of an interlocutory appeal was approved by the district court and this court.

II. DISCUSSION

"In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklos Drilling, Co., 505 U.S. 469, 475, 112 S. Ct. 2589, 2594 (1992). The CLA, 15 U.S.C. § 1667-1667(e), comprises Chapter 5 of TILA, 15 U.S.C. § 1601 et seq., and adopts TILA's civil remedies provision, including the actual damages remedy, for violations of lease disclosure requirements. 15 U.S.C. § § 1640, 1667(d). Section 1640(a)(1) of TILA provides that plaintiffs may recover "any actual damage sustained by such person as a result of the failure" to make required consumer disclosures. The meaning of that subsection is at the heart of this appeal. Sections 1640(a)(2), (3), and (4) provide for statutory damages, attorney's fees and costs.

"Courts give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import." Williams v. Taylor, ___ U.S. ___, 120 S. Ct. 1479, 1488 (2000). Black's Law Dictionary defines actual damages as "[c]ompensation for actual injuries or loss." Black's Law Dictionary 35 (6th ed. 1990). They "flow [ ] from injury in fact" and "make good or replace the loss *caused* by the wrong or injury." *Id.* (emphasis added). According to its plain meaning, the statutory remedy of "actual damages" in section

1640(a)(1) requires a direct causal relationship between the amount of damages and the injury or harm. That the "actual damages" must be "sustained by such person as a result of the failure" links the loss to the failure to disclose. 15 U.S.C. § 1640(a)(1). Actual damage is thus sustained as a result of a failure to disclose under the statute if a consumer can show that, had he been properly informed, he would have engaged in a different or less-expensive transaction.

If the plain meaning alone does not clearly enough indicate that plaintiffs must show detrimental reliance upon a lessor's disclosure violation, the requirement becomes manifest when § 1640(a) is placed in its statutory context and contrasted with the statutory liquidated damages provision.

Preliminarily, it is appropriate to examine the harm that Congress seeks to prevent through enforcement of the CLA and TILA. The CLA was intended "to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements." 15 U.S.C. § 1601(b). Congress concluded that consumers are harmed by a disclosure violation when it prevents them from making informed leasing decisions because they are unable accurately to compare contract terms. Evaluating whether an actual harm results from a disclosure violation requires, first, that the consumer relied on the particular lease terms; second, that the disclosure violation deterred him from inquiring into other lease alternatives; and third, that the alternatives would save

money. In essence, the statute is addressing and seeking to combat detrimental reliance.

The CLA recognizes, however, that damages in these individually small transactions may be difficult to prove and adjusts its remedy to afford actual damages or at least a statutory minimum. A comparison of these provisions supports the conclusion that actual damages are based on detrimental reliance. While the actual damages provision requires a casual connection with the disclosure violation, 15 U.S.C. § 1640(a)(1), the statutory damages provision dispenses with causation and imposes a penalty solely for failure to comply with disclosure requirements. 15 U.S.C. § 1640(a)(2). Without a causation requirement, actual damages would overlay the statutory damages for no apparent reason. Conceptually, however, statutory and actual damages perform different functions: statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain. Actual damages may be recovered where they are probably caused by the violation. In this way, the damage measures are complementary rather than duplicative.

The caselaw confirms that statutory damages may be imposed as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist. *See* Davis v. Werne, 673 F.2d 866, 869 (5th Cir. 1995)("'The statutory damages are explicitly a bonus to the successful TILA plaintiff, designed to encourage private enforcement of the Act, and a penalty against the defendant, designed to deter future violations.'")(quoting Dryden v. Lou Budke's Arrow Finance Co.,630 F.2d 641, 647 (8th Cir. 1980)); *see also* Edwards v. Your Credit, Inc., 148 F.3d 427,

441 (5th Cir. 1998)("the statutory civil penalties must be imposed for . . . a [TILA] violation regardless of the district court's belief that no actual damages resulted or that the violation is de minimus") (quoting Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877, 879 (11th Cir. 1982)). On the other hand, actual damages have consistently been recognized as more difficult to prove. *See* Wood v. Flatau, 643 F.2d 188, 193 (5th Cir. 1980)("[S]tatutory damages compensate the debtor for actual damages that may in fact be 'difficult to ascertain.'"); *see also* McCoy v. Salem Mortgage Co., et al., 74 F.R.D. 8, 12 (E.D. Mich. 1976)("[I]t seems likely that if actual damages could be computed by a simple formula, no statutory damage provision would have been necessary."). The distinction between statutory and actual damages comports with the notion that actual damages awards must be assessed as an individualized harm.[1] *See* Williams v. Public Finance Corp., 598 F.2d 349, 356 (5th Cir. 1979)("The remedial scheme in the TIL Act is designed to deter generally illegalities which are only rarely uncovered and punished, and not just to compensate borrowers for their actual injuries in any particular case."). *See also* The Law of Truth in Lending, P 12.04[a] (1984) ("[F]ew if any TIL plaintiffs have proven or can prove actual damages".).

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[1] In McGowan v. King, Inc., this court stated that the basis of liability under section 1640(a) is "the failure to disclose information required to be disclosed" but that there was "no requirement that the plaintiff himself be deceived in order to sue in the public interest." 569 F.2d 845, 849 (5th Cir. 1978). Our discussion of the remedial scheme, however, was only in the context of the "statutory penalty" awarded to the plaintiff. *Id.* We made no mention of the actual damages provision.

In addition, the only other circuit decision on this issue holds that detrimental reliance is an element of causation in an actual damages award. Setting forth the elements for an actual damages award under § 1640, the Eighth Circuit held that a plaintiff must prove that the "TILA violation was the proximate cause of any actual damages." Peters v. Lupient Oldsmobile Co., No. 99-2783, 2000 WL 1133841, *2 (8th Cir. August 11, 2000). In other words, a plaintiff must show that "(1) he read the TILA disclosure statement; (2) he understood the charges being disclosed; (3) had the disclosure statement been accurate, he would have sought a lower price; and (4) he would have obtained a lower price." *Id.* The plaintiff had bought credit life and disability insurance from a used car salesman for premiums paid to an insurance company. The contract for the policies did not disclose that commissions were paid to the car company for the sale. Instead, the contract listed the premium totals as amounts paid to third parties on the plaintiff's behalf. The plaintiff sued for actual damages under TILA. The Eighth Circuit concluded that the plaintiff failed to meet the fourth element of its test because there was no evidence that he would have received a lower premium from any other insurance provider or that he suffered any actual damages.

Appellants urge us to follow the reasoning of the dissent in the Peters decision.[2] Urging a broad interpretation to effectuate the statute's purpose of protecting the consumer

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[2] Appellants also argue that the plaintiff in Peters did not contest that the four-part test was the proper analysis for determining an actual damages recovery. Peters, 220 F.3d at 917. Peters nonetheless convincingly states the law, and we ordinarily defer to the decisions of sister circuits.

against inaccurate and unfair credit billing, the dissent asserts that actual damages in TILA claims should be measured by the amount of the violators' misrepresentation. The dissenting opinion cites Gibson v. Bob Watson Chevrolet-GEO, Inc., 112 F.3d 283, 285-87 (7th Cir. 1997) and Jones v. Bill Heard Chevrolet, Inc., 212 F.3d 1356, 1363 n. 7 (11th Cir. 2000) as support. Neither of these cases, however, speaks directly to the issue of actual damages. In Jones, the Eleventh Circuit, in a footnote, rejected the defendant's contention that the TILA claim failed because the plaintiff could not demonstrate reliance on its misrepresentation. Jones did not address whether an award of actual damages requires proof of detrimental reliance. In fact, the opinion does not indicate whether the plaintiffs even sought actual as opposed to statutory damages. In Gibson, the Seventh Circuit concluded that the plaintiff stated a claim under TILA without showing that a lower price could have been obtained elsewhere, but again, the court did not distinguish between the remedies of actual or statutory damages.[3] Thus, the cases relied upon by the Peters dissent are not compelling.

We also take guidance from the Eleventh Circuit. In Adiel v. Chase Federal Savings & Loan Assoc., 810 F.2d 1051 (11th Cir. 1987), a class of mortgagors prevailed in a

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[3] Indeed, in Edwards v. Your Credit, Inc., this court cited Gibson for the proposition that stating a claim for a TILA violation generally is different from alleging the type of harm. 148 F.3d 427, 441 (5th Cir. 1998) (quoting Gibson, 112 F.3d at 287 ("[T]he issue is not whether these violations are technical, or whether technical violations should be actionable, or whether consumer class actions should be discouraged, but whether the complaints in these actions state a claim.").

lawsuit to recover damages from Chase Federal Savings and Loan Association ("Chase") for Chase's failure to present them with truth-in-lending documents. *Id.* at 1053. The district court adopted a "but-for" test similar to detrimental reliance in its determination of whether to award actual damages. Adiel v. Chase Federal Savings & Loan Assoc., 630 F. Supp. 131, 133 (1986). The Eleventh Circuit affirmed the award of statutory damages and the district court's denial of actual damages. Adiel, 810 F.2d at 1055. Indeed, the overwhelming majority of district courts to address this issue have held that detrimental reliance is an element of actual damages.[4]

Appellants make various arguments in support of their position that detrimental reliance should not be an element of actual damages. First, they would have us follow the reasoning of In re Russell, 72 B.R. 855 (Bankr. E.D. Pa. 1987), where a bankruptcy judge articulated the test for actual damages as one where there has been a "substantial violation" as opposed to a "technical violation" of the statute. The plain language of the statute makes no such distinction. Nor has this court held that actual damages are to be confined to substantial violations. Moreover, this test would call upon the

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[4] *See, e.g.*, Anderson v. Rizza Chevrolet, Inc., 9 F. Supp. 2d 908, 913 (N.D. Ill. 1998); Barlow v. Evans, 992 F. Supp. 1299, 1310 (M.D. Al. 1997); Wiley v. Earl's Pawn & Jewelry, Inc., 950 F. Supp. 1108, 1114 (S.D. Al. 1997) ("[u]nless a person can prove that he would have gotten a better interest rate or, perhaps, foregone the loan altogether, he has suffered no actual loss"); Cirone-Shadow v. Union Nissan of Waukegan, 955 F. Supp. 938, 943 (N.D. Ill. 1997); McCoy v. Salem Mortgage Co., 74 F.R.D. 8, 12 (E.D. Mich. 1976).

court to differentiate between technical and substantial violations. Such a test "marks a radical departure from established Truth in Lending case law." D. Edwin Schmelzer, Truth in Lending Developments in 1987: An Active Year on Several Fronts, 43 Bus. Law. 1041, 1067-68 (May, 1988).

Appellants also advocate their version of principles of contract law. They assert that TILA and CLA govern the contractual relationship between the parties. By not itemizing the acquisition fee, GMAC allegedly deprived the consumers of the benefit that they bargained for when they signed their agreements. Traditional breach of contract principles would give the aggrieved parties the "benefit of the bargain," which would place them in the position they would have had if the violation had not occurred. A return of the $400 acquisition fee, they contend, would accomplish that goal; reliance is irrelevant.

Even if this is a correct statement of contract law, we disagree with the attempt to transform this statute-based claim into one founded on contract. Congress gave no indication that courts should base damage awards on anything other than the explicit words of the statute. Rather, "[w]ith rigorous regard for providing consumers with full disclosure of the terms and conditions of credit purchases, Congress fashioned an elaborate system of remedies and penalties to effectuate compliance with the Truth-in-Lending Act and to redress grievances stemming from its violation." Sosa v. Fite, 498 F.2d 114, 117 (5th Cir. 1974). The statute is not a remedy for breach of contract. "The damage provisions, providing minimum and maximum limits, [are] inconsistent with such a thesis. Rather, sec. 1640 provides a 'civil penalty.'" Sellers v. Wollman, 510 F.2d 119, 122 (5th Cir. 1975).

Next, appellants argue that the overall structure of TILA establishes that detrimental reliance is not an element of recovery. For example, proof of detrimental reliance is unnecessary for either regulatory enforcement or creditor self-policing. By contrast, they contend, the remedy of restitution is imbedded within the statute. First, appellants assert that *Regulation M*, 12 C.F.R. § 213 et. seq., the regulation implementing the consumer leasing provisions of TILA, made lessors subject to the enforcement agencies' restitution policy. Second, they focus on the "correction of errors" provision, which allows a creditor to avoid civil liability if, within sixty days after discovering an error, it notifies the consumer of the error and makes whatever adjustments are appropriate to assure that the person is not required to pay an amount in excess of the charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower. 15 U.S.C. § 1640(b).

We disagree with the implications appellants claim from other TILA remedial procedures. If Congress had meant for restitution to be the measure of actual damages, it could have easily said so in the statute. It did not. The fact that restitution is an available remedy for some purposes does not mean that Congress intended for this to be the measure of all other damages. Administrative, self-policing, and civil remedies serve distinct functions. Restitution seems more appropriate as a regulatory penalty because it is easy to measure and because an agency can be expected to enforce disclosure regulations with prosecutorial discretion, reining in the most harmful violations. The self-policing restitution remedy encourages prompt, prophylactic cure of disclosure

violations.[5] The actual damage remedy, however, speaks only to compensation of individual losses suffered from violations. While the remedies may share the common goal of increased disclosure, there is no reason to suppose that they must share the same mechanism of enforcement.[6]

Appellants argue that we should apply to TILA the Supreme Court's reasoning in Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 92 S. Ct. 1456 (1972), in which the Court allowed an action for damages without proof

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[5] Finally, it is questionable whether the restitution remedy even applies to the type of disclosure violation at issue here. GMAC argues that the restitution authority of the administrative enforcement agencies is contained in TILA Section 108(e) and is limited to Annual Percentage Rate and finance charge disclosure violations by creditors. Such requirements do not apply to a consumer lease. *See* 15 U.S.C. § 1607(e)(1). Appellants counter that *Regulation M*, 12 C.F.R. § 213.1 specifically incorporated the TILA "administrative enforcement" provision, 15 U.S.C. 1607(e). In addition, they assert that because the Act gives the Federal Reserve Board wide latitude in prescribing regulations and delegates substantial enforcement powers, there is ample reason to find that lessors may be subject to agency enforcement restitution adjustments.

[6] Appellants also observe that because TILA admonishes courts to consider "the amount of any actual damages awarded" in determining a class action award, § 1640(a), Congress intended that actual damages are available and anticipated for TILA class actions. There is no logical connection between this statement and the separate question of what formula to apply for measuring actual damages.

of reliance for any material violation of Rule 10b-5. They attempt to analogize TILA to Rule 10b-5 by stating that the mandate that lessors disclose certain costs associated with obtaining credit, including the "acquisition fee" at issue here, makes the existence of such costs "material" facts. But, "[u]nlike 10b-5, the roots of Truth in Lending are not in protection against common law fraud, and while any Truth in Lending violation necessarily makes the task of shopping for credit more difficult, that does not translate into a 'material' violation." McCoy v. Salem Mortgage Co., 74 F.R.D. 8, 13 (E.D. Mich. 1976).

Both parties make use of legislative history. "Only if we find the text of [a statute] to be opaque or translucent, or even merely ambiguous, must we attempt to divine congressional intent by applying prescribed canons of statutory interpretation including, without limitation, a resort to the rule of lenity and legislative history." U.S. v. Barlow, 41 F.3d 935, 942 (5th Cir. 1994). While we need not rely on legislative history, it appears to support the understanding that statutory damages serve as an incentive to ensure compliance, while actual damages are regarded as more difficult to prove.[7]

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[7] GMAC points to the fact that actual damages were not an available remedy at the time of the initial enactment of TILA in 1968 in order to emphasize that statutory damages were included in order to encourage enforcement by private parties. Specifically, they note that the Senate Report accompanying the initial enactment include this goal as the purpose of the civil penalties section. *See* H.R. Rep. No. 90-1040, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976; *accord*, S. Rep. No. 93-278, at 14 (1973) ("The purpose of the civil penalties section under Truth in

Since individual reliance is necessary to prove actual damages, a class action may not be certified on this issue. *See* Castano v. American Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996).

CONCLUSION

For the foregoing reasons, the district court's order disallowing certification of the class with respect to actual damages and requiring proof of detrimental reliance to establish actual damages, is **AFFIRMED**. The case is **REMANDED** for further proceedings consistent herewith.

Lending was to provide creditors with a meaningful incentive to comply with the law."). When the act was amended in 1974, the Senate Report discussing the amendments notes that "[s]ince it is difficult to prove any actual monetary damage arising out of a disclosure violation, the Act provides that a consumer bringing a successful action is entitled to collect court costs and reasonable attorney's fees plus twice the amount finance charge but not less than $100 nor more than $1,000." S. Rep. No. 93-278, at 14 (1973). The report continues: "most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to ensure compliance." *Id.* at 15. In addition, the Senate Report that accompanied the CLA stated that "[t]he purpose of the legislation is to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases, and between leases and credit sales." *See* S. Rep. No. 94-950 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed July 23, 1999]

CIVIL ACTION NO. 97-2552

SECTION "B"

GILBER V. ANDRY, JR. and	)
PAUL M. PERRONE, Individually	)
and on Behalf of Others Similarly	)
Situated	)
	)
VERSUS	)
	)
GENERAL MOTORS	)
ACCEPTANCE CORPORATION	)
	)

MAGISTRATE (1)

PLAINTIFFS' EX PARTE MOTION FOR ENTRY OF FINAL JUDGMENT OR IN THE ALTERNATIVE, EX PARTE MOTION TO CERTIFY A QUESTION OF LAW FOR APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b) AND INCORPORATED MEMORANDUM

NOW INTO COURT, through undersigned counsel, come plaintiffs, Gilbert Andry, Doris McCullough and Paul Perrone and on suggesting to the Court that on February 11, 1999 this Court certified this matter as a Class Action; that at the time of Class Certification the issues pending were those pertaining to liability, actual damages, and statutory damages for an alleged violation of the Consumer Leasing Act; that on July 15, 1999 this Court entered an Order de-certifying the Class as it pertains to the issues of actual damages; that as a result of this Order, the claim for actual damages previously certified as a class claim has been dismissed; and that accordingly, plaintiffs are entitled to a Final Judgment.

Based on the foregoing, plaintiffs request this Court to find that there is no just reason for delay and direct the entry of a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure concerning the decertification of the class claim for actual damages.

Plaintiffs maintain that an Entry of Final Judgment pursuant to Federal Rules of Civil Procedure 54(b) is the appropriate remedy so that plaintiffs would be afforded an appeal as of <u>right</u>, as opposed to being relegated to relief under 28 USC 1292(b) which relief is dependent upon the Court of Appeals, in its discretion, permitting such an appeal.

Alternatively, and only in the event this Court declines to enter a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure concerning the decertification of the class claim for actual damages, then the plaintiffs request this Court to find that the Order rendered on July 15, 1999 involves a controlling question of law as to which there is substantial ground for difference of opinion and

that an immediate appeal from the Order may materially advance the ultimate determination of the litigation. Plaintiffs respectfully submit that the controlling question of law should be: "Is it necessary for each individual class member to prove detrimental reliance in a claim for actual damages arising out of a violation of the Consumer Leasing Act?"

The plaintiffs further request that this Court issue an Order staying all proceedings pending a determination by the United States Court of Appeals, Fifth Circuit.

Respectfully Submitted,

/s/_____

MICHAEL H. ELLIS (#5334)
GEORGE B. RECILE (#11414)
Chehardy, Sherman, Ellis, Breslin & Murray
One Galleria Boulevard, Suite 1100
Metaire, Louisiana 70001-7507
Telephone: (504) 833-5600

CERTIFICATE OF SERVICE

I DO HEREBY, certify that a copy of the foregoing pleading has been served upon all counsel for all parties by hand delivery or by mailing the same to each, properly addressed and postage prepaid this 23rd day of July, 1999.

/s/_____

GEORGE B. RECILE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Denied 7/30/99]

CIVIL ACTION NO. 97-2552

SECTION "B"

GILBERT V. ANDRY, JR. and	)
PAUL M. PERRONE, Individually	)
and on Behalf of Others Similarly	)
Situated	)
	)
VERSUS	)
	)
GENERAL MOTORS	)
ACCEPTANCE CORPORATION	)
	)

MAGISTRATE (1)

ORDER OF FINAL JUDGMENT

The Court, finding that there is no just reason for delay and that the entry of a final Judgment pursuant to Federal Rules of Civil Procedure 54(b) is appropriate;

IT IS HEREBY ORDERED that a final Judgment be and is hereby entered in favor of General Motors Acceptance Corporation decertifying the plaintiffs' class as it pertains to the issue of actual damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings be and are hereby stayed pending a decision by the United States Court of Appeals, Fifth Circuit.

NEW ORLEANS, LOUISIANA, this ____ day of _____ ,1999.

_____
JUDGE

[Denied. See related minute entry of this date.

/s/_____

7/30/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Denied 7/30/99]

CIVIL ACTION NO. 97-2552

SECTION "B"

GILBERT V. ANDRY, JR. and	)
PAUL M. PERRONE, Individually	)
and on Behalf of Others Similarly	)
Situated	)
	)
VERSUS	)
	)
GENERAL MOTORS	)
ACCEPTANCE CORPORATION	)

MAGISTRATE (1)

ALTERNATIVE ORDER

The Court, finding that pursuant to its Order dated July 15, 1999 that it is necessary for each: (a) individual class member to prove detrimental reliance in a claim for actual damages arising out of a violation of the Consumer Leasing Act and that as such, the plaintiffs' claim for actual damages cannot be certified as a class claim; and (b) that this issue involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the Order pursuant to 28 USC 1292(b) may materially advance the ultimate determination of the litigation;

IT IS ORDERED that this Court's Order of July 15, 1999 decertifying the class claim concerning the issue of actual damages be and is hereby amended to provide that "the issue of whether it is necessary for each individual class member to prove detrimental reliance in a claim for actual damages arising out of a violation of the Consumer Leasing Act involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order pursuant to 28 USC 1292(b) may materially advance the ultimate determination of the litigation."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings be and are hereby stayed pending a decision by to the United States Court of Appeals, Fifth Circuit.

NEW ORLEANS, LOUISIANA, this ____ day of _____ ,1999.

_____

JUDGE

[Denied. See related minute entry of this date.

/s/_____

7/30/99]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed July 30, 1999]

CIVIL ACTION NO. 97-2552

SECTION: B(1)

GILBERT V. ANDRY, JR., ET AL.	)
	)
VERSUS	)
	)
GENERAL MOTORS ACCEPTANCE CORPORATION	)

MINUTE ENTRY

LEMELLE, J.

JULY 30, 1999

Plaintiff has filed a motion for final judgment pursuant to Fed. R. Civ. P. 54(b) and/or in the alternative for interlocutory appeal pursuant to 28 U.S.C. 1292(b). Plaintiff wishes to have the Fifth Circuit review the issue of actual damages in the instant matter and whether detrimental

reliance must be proven. In our Order & Reasons of July 15, 1999, we stated that in order to prove actual damages, plaintiffs must also prove detrimental reliance. Rec. Doc. No. 65. Therefore, in accordance with Castano American Tobacco Company, 84 F.3d 734 (5th Cir. 1996), we refused to certify the issue of actual damages as a class issue.

Plaintiffs now wish to have that heard by the Fifth Circuit, either by issuing a Rule 54(b) judgment on the actual damages issue or through an interlocutory appeal pursuant to 28 U.S.C. 1292(b). Defendant opposes this Court's grant of a Rule 54(b) judgment on the grounds that the class has never received notice of the certification and class members have not has an opportunity to opt-out of the class. The Court agrees with defendant that a Rule 54(b) judgment on the actual damages issue at this stage of the case raises procedural and/or due process problems to the extent that a partial final judgment is a dismissal on the merits of the actual damages class claim. This Court did not dismiss the actual damages claim, but rather decertified it as to the class action. Individual plaintiffs are entitled to pursue that claim outside of the class action.

Regarding the 1292(b) motion, defendant agrees that certification of the issue warranted, but disagrees with the plaintiffs in their phrasing of the issue. Specifically, the issue framed by plaintiffs is: "Is it necessary for each individual class member to prove detrimental reliance in a claim for actual damages arising out of a violation of the Consumer Leasing Act?" Defendant would frame the issue as follows: "Must detrimental reliance be proven to recover actual damages for a disclosure violation under the Consumer Leasing Act?"

Section 1292(b) sets forth three criteria, "all of which must be met before the district court may properly certify an interlocutory order to appeal." Aparicio v. Swan Lake, 643 F.2d 1109, 1110 n. 2 (5th Cir. 1981). The district court must certify in writing that there is a controlling issue of law involved in the order of the court at issue, that there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Id.

We agree with defendant's phrasing of the controlling issue of law, which better reflects the facts of this case. That is, must detrimental reliance be proven to recover actual damages for a disclosure violation arising under the Consumer Leasing Act? Prior pleadings filed by both parties demonstrate that what is at issue here is whether the actions of defendant amount to a disclosure violation of the Consumer Leasing Act.

There is substantial grounds for difference of opinion on the issue of actual damages. As noted by this Court in our previous Order & Reasons on the actual damages issue, there is little case law on the issue, none of it is controlling in this Circuit. Plaintiffs relied on In re Russel, 72 B.R. 855 (E.D.Pa. 1987) while defendant relied on Adiel v. Chase Federal Savings and Loan Association, 630 F.Supp. 131 (S.D.Fla. 1986) *aff'd* 810 F.2d 1051(11th Cir. 1987) and the comments of lawmakers from the floor, all of which supported each parties claims.

An immediate appeal may materially advance the ultimate termination of this litigation. Without actual damages, many plaintiffs will be forced to pursue these

damages individually. If the Fifth Circuit determines that actual damages are allowable in this class action, then this Court can determine the actual damages of all class members.

Additionally, this issue appears to be one which is appealable under Fed. R. Civ. P. 23(f). An appeal under this rule is allowed where it may facilitate the development of the law. Blair v. Equifax Check Services, Inc., 1999 WL 415504, *2 (7th Cir. June 22, 1999). "When an appellant can establish that such an issue is present, Rule 23(f) permits the court of appeals to intervene." Id. As noted above, both parties have demonstrated that, and this Court agrees, such an issue is present, and a ruling by the Fifth Circuit will facilitate the development of the law. "Law may develop through affirmances as well as reversals." Id.

For the aforementioned reasons,

IT IS HEREBY ORDERED that plaintiffs' motion for final judgment on the issue of actual damages is **DENIED**.

IT IS FURTHER ORDERED that plaintiff's motion to certify the issue of actual damages to the Fifth Circuit pursuant to 28 U.S.C. 1292(b) is **GRANTED**. The issue to be certified is: Must detrimental reliance be proven to recover actual damages for a disclosure violation arising under the Consumer Leasing Act?

/s/_____
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed July 15, 1999]

CIVIL ACTION NO. 97-2552

SECTION: B(1)

GILBERT ANDRY, JR., ET AL.)
)
VERSUS)
)
GENERAL MOTORS)
ACCEPTANCE CORPORATION)
)

Order & Reasons

Defendant filed a motion to clarify the scope of the class (Rec. Doc. No. 48). This Court held oral argument on that motion on May 26, 1999, and granted in part and denied in part defendant's motion. The issue of damages and costs of notification were taken under advisement. The Court instructed the parties to submit additional briefs on the issue of actual damages. The Court has reviewed those briefs, along with the arguments presented in the parties' original briefs. Accordingly,

IT IS HEREBY ORDERED that defendant's motion to clarify the scope of the class relating to the issue of actual damages is **GRANTED**.

Defendant' s Arguments

Defendant first notes that the Court has requested additional briefing on three issues:

1) whether Congress, when amending TILA, intended courts to construe it strictly, rather than liberally, as regards the consumer credit/leasing provisions;

2) whether a lessee must allege and prove detrimental reliance and resulting monetary injury as a result of the lessor's failure to provide required disclosures in order to recover actual damages' under 15 U.S.C. § 1640(a) (1); and

3) whether the Fifth Circuit's decision in Castano v. American Tobacco Company, 84 F.3d 734 (5th Cir. 1996), precludes a class wide recovery of actual damages due to the necessity of class members to prove detrimental reliance.

Defendant begins its argument by giving a brief description of its leasing practices. Defendant admits it charged originating lessors a $400 acquisition fee when the lease was assigned to defendant, which fee was passed on to the lessee by the originating lessor. Defendant claims this fee was factored into the amount of monthly payments due over the lease term. Plaintiffs have alleged that defendant failed to properly itemize and disclose this amount in accordance with the Consumer Leasing Act (CLA), 15 U.S.C. § 1667, et *seq.*,

and its implementing regulation, Regulation M (Reg M), 12 C.F.R. § 213, and not that the fee itself was illegal.

Defendant argues that the language of the prior Reg M did not require itemization and disclosure of such fee if the fee was to be paid over the term of the lease, as opposed to being paid by the lessee at consummation of the lease. Prior Reg M did not require the originating dealer to disclose the various costs that were factored into the amount of monthly payments to be charged the lessee over the terms of the lease. 12 C.F.R. 213.4. All that was required by the Reg was disclosure of the number, amount and due dates of the payments and the total amount of the payments. Defendant complied with this requirement.

In addressing the first issue raised by defendant, defendant begins by arguing that the liberal construction decisions relied upon by plaintiffs relate only to the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.*, and its implementing regulation, Regulation Z (Reg Z), 12 C.F.R. 226.1, *et seq.*, not the civil liability provisions of § 1640(a) or the actual damages provisions therein. Furthermore, many of the case cited by plaintiffs were decided prior to the TIL Simplification and Reform Act of 1980. Act of March 31, 1980, P.L. No. 96-221. Congress revised TILA and Reg Z, thereby legislatively overruling most of the cases relied upon by the plaintiffs.

Defendant also takes issue with plaintiffs' reliance on Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475 (5th Cir. 1995) and Edwards v. Your Credit, Inc., 148 F.3d 427 (5th cir. 1998), wherein the Fifth Circuit stated that courts should liberally construe TILA in favor of consumers. According to

defendant, those decisions looked to McGowan v. King, 569 F.2d 845 (5th Cir. 1978), which was effectively overruled by the TIL Simplification Act, and Meyers v. Clearview Dodge, Inc., 384 F.Supp. 722 (E.D.La. 1974), which was expressly overruled by the TIL Simplification Act. Therefore, according to defendant, these cases have no precedential value for the liberal construction argument offered by plaintiffs and cannot be cited as authority.

In support of its argument, defendant directs the Court to Ford Motor Credit Company v. Milhollin, 455 U.S. 555, 100 S.Ct. 790 (1980), wherein the Supreme Court directed the lower courts to defer interpretation of TILA to the Federal Reserve Board (Fed), so long as the Fed's lawmaking is not irrational. Therefore, this Court does not have the authority to expand the civil liability provisions of §1640(a). Congress provided for the recovery of actual damages, but proof of detrimental reliance must be shown. Defendant next addresses that issue.

Defendant argues that the decision of the bankruptcy court in In re Russell, 72 B.R. 855 (E.D.Pa. 1987), which plaintiffs urge this Court to follow, is neither controlling authority nor good law. There the court found that the defendant creditor's understatement of the finance charge and the annual percentage rate (APR) in plaintiff's loan resulted in such serious TILA and Reg Z violations as to warrant awarding damages equal to the lower finance charges disclosed and the higher charges which should have been disclosed. According to defendant, Russell has been widely criticized and should be limited to finance charges and APR disclosure violations. Restitution is not an available/proper damages award for the type of non-serious, technical violation

of CLA/Reg M at issue here. Plaintiffs were not required to pay more than the total amount disclosed.

Defendant argues that Russell was congressionally overruled when TILA was amended in 1995. Statements by congressmen recognized that Adiel v. Chase Federal Savings & Loan Association, 630 F.Supp. 131 (S.D.Fla. 1986), *aff'd* 810 F.2d 1051 (11th Cir. 1987), provides the correct interpretation of actual damages under TILA, which is to require a showing of detrimental reliance. Exhibits 12 and 13. Defendant also cites two cases in support of this proposition. Laughman v. Wells Fargo Leasing Corp., 1997 WL 567800 (N.D. Ill. Sept 2, 1997); Tarnoff v. American Honda Finance Corp., 1999 WL 98331 (N.D. Ill. Feb. 19, 1999).

Defendant then addresses the Castano issue. According to defendant, as a matter of law, plaintiffs must prove detrimental reliance and resulting monetary injury in order to recover CLA actual damages. Castano v. American Tobacco, 84 F.3d 734 (5th Cir. 1996), precludes the plaintiffs' class claims seeking recovery of actual damages. In that case, the Fifth Circuit held that where individual issues of reliance exist, class certification is inappropriate.

Defendant then classifies plaintiffs' case as one of misdisclosure as opposed to nondisclosure as plaintiffs' characterize it. This distinction is withoutdifference. Defendant argues that this case involves simply an alleged technical failure to itemize and identify a component of a total amount which plaintiffs agreed to pay, such total amount being completely disclosed. Therefore, this is not nondisclosure of a fee, but rather misdisclosure of the components included in the amount to pay.

Defendant then cites to two case from the Eastern District of Louisiana in which Courts have followed Castano and not certified class actions where the issue of reliance involved nondisclosure. In re Ford Motor Company Paint Litigation, 182 F.R.D. 214 (E.D. La. 1998) (allegations that defendant knew paint was defective but failed to disclose knowledge of defect); Young v. Ray Brandt Dodge, 176 F.R.D. 230 (E.D.La. 1997) (factors surrounding individual plaintiffs' decision to purchase insurance precluded certifying class action).

Plaintiffs ' Arguments

Plaintiffs begin by arguing that defendant had a clear internal policy of charging the consumer the acquisition fee at the inception of each lease. Exhibit 1. According to plaintiffs, internal documents of defendant demonstrate defendant's knowledge of the requirement that the fee be specifically disclosed. Defendants made no representations whatsoever with regard to this fee, therefore this case is a nondisclosure case. Plaintiffs classify the issue in defendant's motion to clarify as one issue: is detrimental reliance an element of proof in a consumer's claim for actual damages in a CLA nondisclosure case? Plaintiffs argue that one cannot detrimentally rely upon that which one does not know.

Plaintiffs then reiterate much of the argument made in their opposition to defendant's motion to clarify. Plaintiffs cite Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152-55, 92 S.Ct. 1456, 1471-72 (1972), a Securities Exchange Act (SEA) case, for the proposition that this Court should permit recovery of actual damages without proof of detrimental reliance. According to plaintiffs, the underlying

purpose of the SEA, that of full disclosure, is identical to that of TILA as shown in Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377, 93 S.Ct. 1652, 1664 (1973). Therefore, since the SEA permits actual damages without proof of detrimental reliance, so should TILA.

Plaintiffs argue that defendant has failed to cite to any case which resembles the fact of the instant case in support of its position, detrimental reliance as a necessary element of proof. However, plaintiffs are also unable to cite to any case in support of their position with facts resembling the instant case. According to plaintiffs, the cases relied upon by defendant in support of its detrimental reliance argument, Adiel and its progeny, are not nondisclosure cases and therefore are inapplicable to the instant case.

Plaintiffs next address the Castano issue, claiming that there are numerous reasons why that case should not be applied here. Plaintiffs first distinguish Castano on the facts. Castano presented a class of millions for personal injury claims based on nicotine addiction. Here, the failure of GMAC to disclose the fee caused plaintiffs a financial injury which is quantifiable as to all plaintiffs. Second, the trial court in Castano did not adequately consider the state law variations. The instant case deals with federal law, which law requires an objective finding of whether the statute had been followed.

Further, plaintiffs argue that the Fifth Circuit distinguished individual reliance from standardized reliance. The facts here are those of standardized reliance, there is one omission common to all class members.

Plaintiffs again urge this Court to adopt the rationale of Russell, and to hold that a consumer is not required to prove detrimental reliance in order to recover actual damages in a TILA nondisclosure case. Plaintiffs base their argument on the notion that the actions of defendant did not constitute a technical violation of TILA. Plaintiffs set forth through several other reasons as to why this Court should not require proof of detrimental reliance for actual damages. First, the statute does not contain a detrimental reliance requirement for actual damages. However, the statute does not prohibit it. Second, the statute should be liberally construed in favor of the consumer. The Fifth Circuit has recognized the remedial purpose of TILA. Edwards v. Your Credit, 148 F.3d 427 (5th Cir. 1998) quoting Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475, 482 (5th Cir. 1995); Ellis v. General Motor Acceptance Corp., 160 F.3d 703, 707 (11th Cir. 1998). The Court notes that these case deal with APR and Reg Z.

Plaintiffs then contend that restitution is the appropriate remedy, as adopted by the Russell court. Two other sections of TILA require this remedy, § 1667d and 1607.

Law & Discussion

The parties have not presented the Court with anything new and nothing definitive concerning the issue of actual damages. Defendant's supplemental memorandum simply elaborates on its argument that the civil liability provisions of TILA require proof of detrimental reliance in order to prove actual damages. Besides Adiel and its progeny, defendant' s only credible support is legislative history. In the documents presented to the Court, several lawmakers are quoted as

saying Adiel is the proper interpretation of the actual damages provision and that detrimental reliance is necessary to prove such damages. However, this does not appear to be as strong a support as defendant would have the Court believe. That legislative history is the statement of lawmakers from the floor, not the statement of the committee which developed the legislation. Exhibits 12 and 13.

Plaintiffs are in the same position. Russell is the only case which supports plaintiffs' theory. Plaintiffs correctly assert that the Fifth Circuit has said, albeit in *dicta*, that TILA is a remedial statute which should be construed liberally. Fairley; Edwards. However, the legislative history shows lawmakers sought to simplify TILA and construe TILA's disclosure requirements less liberally. Exhibits 6 and 7. But this goes to disclosure, not actual damages.

Neither party has presented a solid argument in favor of their position. Plaintiffs point to Russell, while defendant points to legislative history and Adiel. The weight of authority leans in favor of defendant on this issue. Two lawmakers have specifically said that detrimental reliance must be proven for plaintiffs to recover actual damages. Combined with Adiel and its progeny, it outweighs plaintiffs' argument, which relies on Russell, non-TILA cases and Fifth Circuit cases declaring TILA to be remedial in nature.

Therefore, this Court finds that, in order to prove actual damages, plaintiff must prove detrimental reliance. Accordingly, per Castano, this Court cannot certify plaintiffs' class action as to actual damages.

New Orleans, Louisiana this 15th day of July, 1999.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed April 16, 1999]

CIVIL ACTION NO. 97-2552

SECTION B

GILBERT ANDRY, JR., ET AL.)
)
)
VERSUS)
)
GENERAL MOTORS)
ACCEPTANCE CORPORATION)
)

MAGISTRATE 1

DEFENDANT GMAC'S MOTION TO CLARIFY THE SCOPE OF THE CLASS SO THAT PLAINTIFFS MAY PROCEED WITH CLASS NOTIFICATION

Pursuant to Federal Rule of Civil Procedure 23(c), defendant General Motors Acceptance Corporation ("GMAC") respectfully seeks an order clarifying the scope of the class in light of this Court's Order of February 10, 1999 certifying a class (hereafter the "Order"). Clarification of the

scope of the class is necessary in light of the Order and issues not addressed previously. Such clarification is necessary so Plaintiffs may proceed to notify Class members of the pendency of this action, in a form and manner to be approved by this Court. Plaintiffs must provide such notice before the merits of the action can be resolved by the Court so that any resulting judgment complies with due process requirements and can have *res judicata* effect. Fed. R. Civ. P. 23(c)(1),

For the reasons discussed more fully in its supporting memorandum, GMAC respectfully requests that the Court: (i) clarify its February 10, 1999 Order and define the parameters and purpose of the Class in the manner set forth in the proposed order; (ii) require Plaintiffs to file a proposed form and manner of notice to Class members with the Court within fifteen days after entry of the proposed order; and (iii) give GMAC fifteen days within which to provide the Court with its comments regarding Plaintiffs' proposed form and manner of Class notice.

Dated: April 16, 1999, New Orleans, Louisiana

Respectfully submitted,

McGLINCHEY STAFFORD,
/s/_____
Anthony Rollo, T.A. (#01133)
David Willenzik (#13487)
Lauren Zimmermann Garvey (#23383)
A Professional Limited Liability Company
643 Magazine Street
New Orleans, Louisiana 70130
Telephone (504) 586-1200

ATTORNEYS FOR GENERAL MOTORS
ACCEPTANCE CORPORATION

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed February 10, 1999]

CIVIL ACTION NO. 97-2552

SECTION: B (1)

GILBERT ANDRY, JR., ET AL.	)
	)
VERSUS	)
	)
GENERAL MOTORS	)
ACCEPTANCE CORPORATION	)
	)

Order & Reasons

IT IS HEREBY ORDERED that plaintiffs' motion for class certification (Rec. Doc. No. 31) is **GRANTED**.

Plaintiffs are individuals who were parties to a motor vehicle lease with defendant General Motors Acceptance Corporation (GMAC) or a lease which had been assigned to GMAC. The leases at issue had a scheduled duration in excess of four months, called for a total payment 'of $25,000 or less, were entered into prior to January 1, 1998 and allegedly contained an administrative or acquisition fee that

was charged the lessee but not disclosed. Plaintiffs allege that GMAC's practice of charging this acquisition fee at the inception of the lease and imposing this fee upon the consumer without disclosing it violates the Truth in Lending Act, Title 15 U.S.C. 1601, et seq. and regulation M, 12 CFR 213, et seq. (1998). Plaintiffs seek to represent the class of plaintiffs who have entered into leases of the type described above.

Law & Discussion

Plaintiffs seek to certify the class of all U.S. residents as of the date of certification who were parties to a motor vehicle lease with GMAC or a lease which had been assigned to GMAC and which: 1) had a scheduled duration in excess of four months; 2) called for a total payment of $25,000 or less; 3) was entered into prior to January 1, 1998; and 4) wherein an administrative/acquisition fee was charged the consumer and not disclosed. There are six basic requirements for class certification under FRCP 23 (b)(3) . FRCP 23 (a) imposes four prerequisites: numerosity, commonality, typicality and adequacy of representation. FRCP 23 (b)(3) requires that there be common factual and legal issues which predominate and that the movant has shown that a class action is the superior method of adjudication. Applewhite v Reichhold Chemicals, Inc., 67 F.3d 571, 573 (5th Cir. 1995); Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 472-472 (5th Cir. 1986). Plaintiffs have demonstrated that they have satisfied the six requirements necessary for class certification under FRCP 23.

The first prerequisite to a class action is numerosity. The class must be so numerous that joinder of all the

members of the class would be impracticable, Payne v. Don Bohn Ford, Inc., 1998 WL 131737, *6 (E.D.La. March 20, 1998). Plaintiffs have alleged that there are hundreds of thousands of consumer leases currently in effect. GMAC is always paid the acquisition fee at the inception of the lease. Exhibit D, p. 18. Defendant does not contest the issue of numerosity. Any person who signed a lease with GMAC would have paid this fee. Although it seems logical to assume that there are potentially thousands of leases in existence plaintiffs have not provided any evidence showing how many leases are currently in existence which meet the criteria plaintiffs have set forth.

A district court has wide discretion in certifying a proposed class, McGrew v. Texas Bd. of Pardons & Paroles, 47 F.30 158, 162 (5th Cir. 1995), and need not make specific findings of fact when ruling on a motion for class certification. Lightbourn v. County of E1 Paso, Texas, 118. F.3d 421, 425 (5th Cir. 1997). A district court need only find that the requirements of FRCP 23 are met. Id. Therefore, it is within this court's discretion to decide, based upon mere allegations that plaintiffs have met the numerosity requirement in this specific instance without the need for specific evidence. It seems logical to determine that this is so, particularly given the fact that defendant has not addressed the issue of numerosity in its opposition and numerous reply memoranda.

The next requirement is commonality. "The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." Id. at 426; Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993). It is not

necessary that the issues and claims of the various plaintiffs be identical. Id. The threshold for commonality is not high. Id.; Jenkins at 472. Plaintiffs have presented an issue of law which is common to all the members of the putative class: was the nondisclosure of the acquisition fee paid to GMAC at the inception of the lease a violation of the Truth in Lending Act (a subpart of which is the Consumer Leasing Act) and Regulation M. Defendant argues that there are too many fact issues relating to each individual which should defeat the commonality requirement. However, this is not sufficient to defeat this requirement The existence of facts which may differ according to an individual plaintiff is not a basis for concluding that the commonality requirement is not met. Forbush at 1106.

The next requirement is typicality. This test, like the one for commonality, is not demanding. Id.; Lightbourn at 426. Typicality looks to the similarity of the named and unnamed plaintiffs' legal and remedial theories rather than the relative strength of the cases of the named and unnamed plaintiffs. Lightbourn at 426; Jenkins at 472. The question is, if the class members were to proceed in a parallel action, would they advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs? Lightbourn at 426. It appears that the class members would advance similar legal and remedial" theories if they were to proceed in a parallel action, given plaintiffs' allegations that GMAC engaged in a uniform course of conduct to avoid disclosure of the acquisition fee, and the fact that GMAC did collect this fee at the inception of each lease. Depositions of GM dealership employees (Exhibit A, pp. 16, 26-27 and Exhibit B, pp. 18 and 69) and GMAC documents provided to

the Court (Exhibits 1 and 2) demonstrate that this fee was paid by the consumer.

The fourth requirement is that the named plaintiffs and their attorneys provide adequate representation of the class. Plaintiffs' counsel have certified in their motion that they have class action litigation experience and that one of plaintiffs' attorneys, Paula Perrone, is familiar with consumer litigation. Defendants try to defeat this requirement by pointing out that Ms. Perrone was once a plaintiff in this action. However, she was granted leave of court to withdraw as plaintiff and become counsel of record. Although plaintiffs' counsel does not specifically cite to any class action or TLA cases which they have been involved with, their reply memoranda addressing the TLA/CLA and Regulation M demonstrate a firm understanding of the relevant issues. Defendant does not raise any issues which show that the representatives or their counsel are inadequate. Furthermore, as noted by the Fifth Circuit in Jenkins at 472, n.5, dissatisfied members may elect opt out of the class.

Having met the four requirements of FRCP 23(a), plaintiffs must also demonstrate that they satisfy FRCP 23 (b)(3). Rule 23 (b)(3) requires that the common factual and legal issues predominate and that the movant show that a class action is the superior method of adjudication. Applewhite at 573. Plaintiffs argue that the only issue in this matter is whether non-disclosure of the acquisition fee violates the TLA. It is clear that this one legal issue predominates the action. Given the allegations in this case, a class action is a superior method of adjudication. The alternative would be to repeat the litigation of this case over and over again, or at the very least have numerous plaintiffs filing numerous lawsuits

on the same issue. Jenkins at 473. Certification of this suit as a class action will promote economies of time, effort and expense for all parties as well as the judiciary.

New Orleans, Louisiana this 10th day of February, 1999.

/s/_____
UNITED STATES DISTRICT JUDGE

MAR 5 2001

No. 00-1251

IN THE

Supreme Court of the United States

PAUL M. PERRONE AND DORIS MCCULLOUGH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Jay N. Fastow
(Counsel of Record)
Joseph W. Gelb
Peter N. Cubita
Yoav M. Griver
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

David S. Willenzik
Anthony Rollo
MCGLINCHEY STAFFORD
643 Magazine Street
New Orleans, LA 70130-3477
(504) 586-1200

March 5, 2001

Counsel for Respondent General Motors Acceptance Corporation

QUESTION PRESENTED

Whether detrimental reliance must be proven to recover actual damages for a disclosure violation arising under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667 *et seq.*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, respondent General Motors Acceptance Corporation hereby discloses that it is a wholly-owned subsidiary of General Motors Corporation.

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IN THE

Supreme Court of the United States

No. 00-1251

PAUL M. PERRONE AND DORIS MCCULLOUGH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

While denial of the petition for a writ of certiorari (the "Petition") does not depend upon factual matters, Respondent offers this Counterstatement of the Case to correct misstatements in Petitioners' Statement of the Case.

Petitioners contend that Respondent "fail[ed] to disclose and identify an 'acquisition fee' of $400.00" purportedly charged at the inception of every vehicle lease agreement that was assigned to Respondent prior to the January 1, 1998

effective date of Revised Regulation M.[1] (Pet. at 3.)[2] Respondent asserts that Petitioners' did not pay the lease acquisition fees at lease inception. Instead, Respondent contends, these amounts were included in the capitalized cost of the Petitioners' respective lease transactions and in their monthly payments. (App. A at 2a-3a.) The monthly payments, as well as the totals of monthly payments, were disclosed to Petitioners in their lease agreements. (R. 609-612, 616-20, 629, 656). Thus, Petitioners' claims involve an alleged failure to itemize a component of fully disclosed amounts. Respondent denies this allegation and contends that its disclosures complied with applicable law.[3] (App. A at 3a.)

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[1] Regulation M (12 C.F.R. Part 213) is the Federal Reserve Board regulation implementing the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667 *et seq*. Regulation M was revised substantially as of January 1, 1998 – after the Plaintiffs allegedly entered into their vehicle lease agreements. Compliance with the revised version of Regulation M became mandatory on January 1, 1998. Consumer Leasing, Delay of Compliance Date, 62 Fed. Reg. 51006 (Sept. 30, 1997) (delaying the mandatory compliance date for Revised Regulation M until January 1, 1998 since it "essentially establishe[d] a new disclosure scheme" that "required the preparation of new forms and the reprogramming of computer software"). Accordingly, unless otherwise noted, all references herein to Regulation M are to the version of Regulation M that was in effect until January 1, 1998.

[2] "Pet. __" denotes citations to the Petition. "App. __" denotes citations to the Petition's Appendix. "R. __" denotes citations to the record before the Fifth Circuit.

[3] Under Regulation M, as it existed at the time, the CLA did not require a lessor to itemize the components of the capitalized cost used to determine the base monthly lease payment. Revised Regulation M, which is *not* applicable to Petitioners' alleged leases, requires disclosure of the "gross capitalized cost" of a motor vehicle lease and a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost prior to the consummation of the lease transaction. *See* Revised Regulation M, 12 C.F.R. § 213.4(f)(1) (2000).

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit, grounded directly in the statutory language and remedial scheme of the CLA, neither conflicts with the decisions of other circuit courts, nor raises an important question of federal law that must be addressed by the Court through this case. Indeed, after the Petition was filed, the Eleventh Circuit issued a unanimous *en banc* decision that overruled the Eleventh Circuit decisions on which Petitioners rely and squarely held that "detrimental reliance is an element of a TILA claim for actual damages." *Turner v. Beneficial Corp.*, __ F.3d __, 2001 WL 172432, at *5 (11th Cir. (Ala.) Feb. 22, 2001). The Petition should be denied.

ARGUMENT

I. THE FIFTH CIRCUIT DECISION IN *PERRONE v. GMAC*

In *Perrone*, the Fifth Circuit unanimously concluded that a plaintiff must demonstrate detrimental reliance to recover actual damages for a CLA disclosure violation. (App. A.) It concluded that the issue was governed by the "plain language" of Section 130(a)(1) of the Truth in Lending Act ("TILA"),[4] 15 U.S.C. § 1640(a)(1), which refers to "any actual damages sustained as a result of the violation":

> According to its plain meaning, the statutory remedy of "actual damages" in section 1640(a)(1) requires a direct causal relationship between the amount of damages and the injury or harm. That the "actual damages"

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[4] The CLA is Chapter 5 of the Truth in Lending Act. A lessor who fails to comply with a CLA disclosure requirement "with respect to any person is liable to such person as provided in Section 130" of TILA. 15 U.S.C. § 1667d(a).

> must be "sustained by such person *as a result of* the failure" links the loss to the failure to disclose. 15 U.S.C. § 1640(a)(1). Actual damage is thus sustained as a result of a failure to disclose under the statute if a consumer can show that, had he been properly informed, he would have engaged in a different or less-expensive transaction.

(App. A at 4a-5a (emphasis added).)

Although its conclusion was dictated by the statutory language, the Fifth Circuit noted that the detrimental reliance requirement becomes further "manifest when § 1640(a) is placed in its statutory context" and contrasted with the statutory damages provision set forth in TILA Section 130(a)(2), 15 U.S.C. § 1640(a)(2). (App. A. at 5a.). The Fifth Circuit explained that the two TILA damages provisions complement one another:

> A comparison of [the statutory and actual damage] provisions supports the conclusion that actual damages are based on detrimental reliance. While the actual damages provision requires a causal connection with the disclosure violation, 15 U.S.C. § 1640(a)(1), the statutory damages provision dispenses with causation and imposes a penalty solely for failure to comply with disclosure requirements. 15 U.S.C. § 1640(a)(2). Without a causation requirement, actual damages would overlay the statutory damages for no apparent reason.

(App. A at 6a.) Rejecting Petitioners' other arguments as contrary to the statutory language and the carefully crafted remedial scheme established by Congress, (App. A at 8a-

15a), the Fifth Circuit affirmed the district court order requiring proof of detrimental reliance to establish actual damages.

II. THE CIRCUIT COURTS UNIFORMLY HAVE HELD THAT PLAINTIFFS MUST PROVE DETRIMENTAL RELIANCE TO RECOVER ACTUAL DAMAGES UNDER TILA SECTION 130(a)(1)

Petitioners contend that a conflict exists between: (1) the Fifth Circuit decision here, and the Eighth Circuit decision in *Peters v. Jim Lupient Oldsmobile Co.*;[5] and (2) prior decisions of the Seventh and Eleventh Circuits. *See* Pet. at 5-8 (citing *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1363 n.7 (11th Cir. 2000); *Ransom v. S&S Food Center, Inc. of Florida*, 700 F.2d 670 (11th Cir. 1983); *Gibson v. Bob-Watson Chevrolet GEO, Inc.*, 112 F.3d 283, 285-87 (7th Cir. 1997)). Petitioners are mistaken.

Whatever confusion might once have existed as to the law in the Eleventh Circuit now has been eliminated. In a unanimous *en banc* decision issued after the filing of the Pe-

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[5] 220 F.3d 915 (8th Cir. 2000). In *Peters*, the Eighth Circuit "appl[ied] the traditional definition to the term actual damages as it is used in [TILA] § 1640, and require[d] that a plaintiff prove an injury or loss" that was proximately caused by the TILA violation. *Id.* at 916-17. Under *Peters*, a TILA plaintiff seeking actual damages must demonstrate that he or she: (1) read the disclosure statement; (2) understood the charges being disclosed; (3) would have sought a lower price had the disclosures been made correctly; and (4) would have obtained a lower price. *Id.* at 917; *see Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1, 4 (1st Cir. 1981) (award of TILA actual damages requires proof of damages and causation, in addition to threshold showing of a TILA violation) (dicta); *see also Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3552 (U.S. Feb. 20, 2001) ("[A]ny resolution of . . . the TILA claims requires an individual assessment of what documents the customer reviewed and in what manner, what representations Defendants made to each customer, and whether the customer selected the extended service agreement").

tition, the Eleventh Circuit expressly overruled both *Jones* and *Ransom*, and squarely held that "detrimental reliance is an element of a TILA claim for actual damages." *Turner v. Beneficial Corp.*, 2001 WL 172432, at *5.

The Eleventh Circuit based its decision on the same statutory language that the Fifth Circuit found compelling, concluding that "this language indicates that the statute's authors intended that plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA". *Id.* The *en banc* court also noted that: (1) the *Jones* Court had relied on a prior Fifth Circuit precedent, which "does not state whether the plaintiff sought actual or statutory damages"; and (2) "the Ransom Court did not squarely address the [detrimental reliance] issue, and it is not clear from the opinion that the issue was actually raised". *Id.* at *4-5 & n.6 (citations omitted).

In *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, the Seventh Circuit addressed whether a TILA claim could proceed under the allegation that an automobile dealer had stated that the entire price of a service contract was being paid to a third party, when the dealer actually was retaining a portion of the charge. *Gibson,* 112 F.3d at 284. Although *Gibson* held that an allegation to this effect stated a TILA disclosure claim, it did not "speak[] directly to the issue of actual damages".[6] (App. A at 9a.) Consistent with this understanding of *Gibson*, numerous post-*Gibson* decisions by district courts within the Seventh Circuit have required detrimental reliance for proof of actual damages.[7]

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[6] *Cf. Peters*, 220 F.3d at 916-17 (addressing detrimental reliance question in case involving the same type of TILA disclosure violation after plaintiff had conceded "that the only remedy for failing to make this type of disclosure . . . is actual damages").

[7] *See Hoffman v. Grossinger Motor Corp.*, No 96-C-5362, 1999 WL 184179, at *4 (N.D. Ill. March 29, 1999); *Anderson v. Rizza Chevrolet,*

(footnote continued. . .)

In sum, no split exists among the circuits requiring resolution by this Court. The only precedents to the contrary are a handful of lower court decisions (*see* Pet. at 6), which, for the most part, follow a bankruptcy court decision that one commentator appropriately characterized as "a radical departure from established Truth in Lending case law". D. Edwin Schmelzer, *Truth in Lending Development in 1987: An Active Year on Several Fronts*, 43 Bus. Law. 1041, 1067-68 (May 1988) (discussing *In re Russell*, 72 B.R. 855 (Bankr. E.D. Pa. 1987)). As the Fifth Circuit noted in its decision, the *Russell* bankruptcy court based its decision on a "substantial violation" versus a "mere technical violation" standard for which there is no support in the language of TILA Section 130(a)(1). (App. A at 10a.)

III. THE DECISION BELOW PRESENTS NO QUESTION OF EXCEPTIONAL IMPORTANCE TO THIS COURT

Apparently dissatisfied with the maximum amount of statutory damages recoverable in a TILA or CLA class action, Petitioners contend that "class actions for actual damages are the only effective means of achieving widespread

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Inc., 9 F. Supp. 2d 908, 913 (N.D. Ill. 1998); *Johnson v. Aronson Furniture Co.*, No. 96-C-117, 1998 WL 641342, at *7 (N.D. Ill. Sept. 11, 1998) (following *Gibson* with respect to the issue of whether service contract disclosure violated TILA, but requiring detrimental reliance to recover actual damages); *Balderos v. Illinois Vehicle Premium Fin. Co.*, No. 96-C-8050, 1997 WL 627650, at *6 (N.D. Ill. Oct. 2, 1997); *Groth v. Rohr-Ville Motors, Inc.*, No. 95-C-05429, 1997 WL 630189, at *3-5 (N.D. Ill. Sept. 30, 1997) (following *Gibson* with respect to question of whether service contract disclosure violated TILA, but noting that "establishing that [a] Saturn [dealership] violated TILA does not end the inquiry. The court must next determine what damages (if any) [plaintiff] may recover for Saturn's TILA violation"); *Laughman v. Wells Fargo Leasing Corp.*, No. 96-C-925, 1997 WL 567800, at *2 (N.D. Ill. Sept. 2, 1997); *Lindsey v. Johnson Oldsmobile, Inc.*, No. 95-C-7306, 1997 WL 269627, at *4 (N.D. Ill. May 14, 1997).

compliance [with TILA]." (Pet. at 10.) However, Petitioner's view of proper "[p]olicy considerations cannot override [the] interpretation of the text and structure of [an] Act." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 168 (1994).

In *Central Bank*, the Court held that no civil liability exists for "aiding and abetting" under Section 10(b) of the Securities Exchange Act of 1934, because the "words 'aid' and 'abet' were not part of the statutory text." 511 U.S. at 176-77. In response to the policy argument that civil aiding and abetting liability would advance the purposes of the Securities Exchange Act, the Court stressed that the "issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id.* at 177.

Here too, Petitioners' personal opinions as to the assertedly inadequate deterrent effect of the TILA statutory damages remedy cannot override the balance struck by Congress between the need to deter potential violations and the desire to avoid subjecting creditors to ruinous liability without proof of "actual damages" sustained "as a result of" a disclosure violation. *Turner*, 2001 WL 172432, at *2 ("Congress placed [a] ceiling on a defendant's statutory [damages] liability in a class action so that courts would no longer have to 'choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations'") (citation omitted).

IV. PETITIONERS' REMAINING CONTENTIONS ALSO LACK MERIT

Petitioners' remaining contentions (App. 10-29) were all raised, in one form or another, before the district court and the Fifth Circuit, and were properly rejected by each of them.

In arguing that a detrimental reliance requirement for actual damages conflicts with the claimed nature of TILA as

a "strict liability, remedial statute" (Pet. at 11-12), Petitioners seek to re-write the statute. They also ignore the Fifth Circuit's observation that "statutory damages may be imposed as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist." (App. A at 6a.) As the Fifth Circuit noted, TILA Section 130(a)'s provision for the recovery of both statutory damages *and* actual damages "comports with the notion that actual damage awards [complement the statutory damage remedy in that they] must be assessed as an individualized harm." (App. A at 7a.)

Petitioners equally disregard the statutory scheme in contending that detrimental reliance should not be required here because it purportedly is not required with respect to two provisions that are not at issue in this case – the administrative agencies' power under TILA Section 108(e), and the creditors' "correction of errors" defense under TILA Section 130(b). The Fifth Circuit rejected this argument, noting:

> Administrative, self-policing, and civil remedies serve different functions. . . . While the remedies may share the common goal of increased disclosure, there is no reason to suppose that they must share the same mechanism of enforcement.

(App. A at 12a (footnotes omitted).)

Equally misplaced are Petitioners' varied attempts to apply theories from entirely different statutory and common law regimes. *First*, Petitioners assert that the Fifth Circuit wrongly rejected their proffered analogy to this Court's securities fraud decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), which they assert "provides for a presumption of reliance where there is a duty to disclose and there has been a material omission." (Pet. at 18.) However, the *Affiliated Ute* exception to the general requirement

of detrimental reliance in Rule 10b-5 cases is attributable to the fact that securities investment decisions often are made in reliance on the integrity of a securities market that does not involve face-to-face transactions:

> The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of Rule 10b-5's reliance requirement must encompass these differences.
>
> . . .
>
> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Basic Inc. v. Levinson, 485 U.S. 224, 243-44, 247 (1988) (citations omitted). Accordingly, this limited presumption of reliance cannot properly be applied outside the Rule 10b-5 context. *See McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 12 (E.D. Mich. 1976) (rejecting application of *Affiliated Ute* to TILA claim). *See also Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir.), *cert. denied*, 528 U.S. 820 (1999) (rejecting attempt to apply *Affiliated Ute* to common law fraud); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 582 (N.D. Ill.) (magistrate report and recommendation) ("Because the consumer market is a non-perfect market, the presumption of reliance in fraud on the market . . . cases [cannot] be extended to consumer fraud cases."), *report and recommendation adopted*, 150 B.R. 36 (N.D. Ill. 1992).

Second, Petitioners misstate the causation requirement for a damages claim under the antitrust laws. Not only must an antitrust plaintiff prove that the antitrust violation caused it injury, *see Zenith v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), it faces the additional hurdle of proving "antitrust injury" (*i.e.*, injury of the type the antitrust laws were intended to prevent). *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977) (affirming dismissal of antitrust claims for lack of "antitrust injury" even though causal injury shown).

Finally, the Fifth Circuit properly denied Petitioners' attempt to apply contract law principles to the "elaborate system of [TILA] remedies and penalties" (*Sosa v. Fite*, 498 F.2d 114, 117 (5th Cir. 1974)) enacted by Congress. As the Fifth Circuit stated:

> [W]e disagree with the attempt to transform this statute-based claim into one founded on contract. Congress gave no indication that courts should base damage awards on anything other than the explicit words of the statute . . . The statute is not a remedy for breach of contract. "The damage provisions, providing minimum and maximum limits, [are] inconsistent with such a thesis . . .." *Sellers v. Wollman*, 510 F.2d 119, 122 (5th Cir. 1975).

(App. A at 11a.)

CONCLUSION

Petitioners' request for a writ of certiorari to the Fifth Circuit should be denied.

Respectfully submitted,

Jay N. Fastow *(Counsel of Record)*
Joseph W. Gelb
Peter N. Cubita
Yoav M. Griver
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

David S. Willenzik
Anthony Rollo
MCGLINCHEY STAFFORD
643 Magazine Street
New Orleans, LA 70130-3477
(504) 586-1200

Counsel for Respondent General Motors Acceptance Corporation

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PAUL M. PERRONE AND DORIS MCCULLOUGH,
Individually and on behalf of others similarly situated,
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GENERAL MOTORS ACCEPTANCE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

MICHAEL H. ELLIS
Counsel of Record
GEORGE B. RECILE
PAULA A. PERRONE
CHEHARDY, SHERMAN, ELLIS, BRESLIN & MURRAY
1 GALLERIA BLVD., STE. 110
METAIRE, LA 70001
(504) 833-5600

WENDELL H. GAUTHIER
SCOTT LABARRE
GAUTHIER, DOWNING, LABARRE BEISER & DEAN
3500 N. HULLEN ST.
METAIRE, LA 70002
(504) 456-8600

JONATHAN B. ANDRY
ANDRY & ANDRY
710 CARONDELET ST., 1ST FL.
NEW ORLEANS, LA 70130
(504) 581-4334

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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GMAC boldly asserts that the decision of the Fifth Circuit neither raises an important question of federal law nor conflicts with the decisions of other circuit courts. This is disingenuous.

In the Fifth Circuit, an *amici curiae* brief was filed by the American Financial Services Association, American Bankers Association and Consumer Bankers Association, representing the trillion dollar consumer credit industry (App. G at 47a-49a). The associations petitioned the Fifth Circuit to hear their views on "an issue of widespread importance and concern to banks in the consumer finance industry" (App. G at 49a) and that the "appellate resolution of this issue will broadly affect the consumer finance industry as a whole." (App. G at 49a.) Likewise, GMAC, requested oral argument in the Fifth Circuit "due to the economic significance to GMAC of the issue presented by this appeal." (App. H at 52a.)

Despite GMAC's protestations to the contrary, the split in the circuits is very much apparent. Close examination of the case law, including the district court decisions of the Seventh Circuit (which GMAC cites in its attempt to undercut the efficacy of *Gibson v. Bob Watson Chevrolet GEO, Inc.*, 112 F.3d 283 (7th Cir. 1997), reveals a legal morass of authority. In sum, the cases cited in GMAC's Opposition demonstrate three separate and conflicting judicial approaches to class claims for TILA actual damages/detrimental reliance.

First, there is the Seventh Circuit *Gibson* decision which holds that reliance is not necessary to state a claim for TILA actual damages. In *Gibson,* the Seventh Circuit found that "the purchaser thinks he will have to pay $800 for an extended warranty, whether he pays cash or buys on credit; whereas, if the retention is really smaller on cash purchasers

than on credit purchases, and the third party's fee net of the retention is the same, the customer will not have to pay $800 if he pays cash for the car. This is the type of fraud that goes to the heart of the concerns that actuate the Truth in Lending Act," citing *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 366-68, 93 S.Ct. 1652, 1659-60, 36 L.Ed. 2d 318 (1973).

Second, there are cases which impose the requirement of detrimental reliance and effectively foreclose any possibility of a TILA class for actual damages. *See, Perrone, et al v. GMAC*, 232 F.3d 433 (5th Cir. 2000); *Turner v. Beneficial Corp.*, __ F.3d __, 2001 WL 172432 (11th Cir. Ala. 2/22/01) (*en banc*); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000).

Third, there are post-*Gibson* court cases from the Seventh Circuit which GMAC asserts support its position that detrimental reliance is required; however, some of those cases take a blended approach to the issue: they certify the class as to liability on actual damages while decertifying the causation/reliance issues, then allow for proof of reliance by presumption or inference. *See, Hoffman v. Grossinger*, 1999 WL 184179 (M.D. Ill. 1999), where, like *Johnson v. Aronson Furniture Co.*, No. 96-C-117, 1998 WL 641342 (N.D. Ill. 9/11/98), the Court certified the class on defendant's conduct and liability while declining to certify issues of causation and actual damages. Quoting from *Califano v. Yamaski*, 442 U.S. 681, 701, 99 S.Ct. 2545, 2557, 61 L.Ed. 2d 176 (1979), "we find that permitting Grossinger's liability to be determined on a class basis, 'saves the resources of both the Court and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'"

This is a far cry from the Court in *Perrone* which eliminated all class actions for actual damages, holding they could not exist because of the individualized reliance requirement. Thus, the split of the circuits is real. The Eleventh Circuit in *Turner* and Fifth Circuit in *Perrone* have effectively destroyed TILA class actions with respect to actual damages. The Seventh Circuit in *Gibson* held that reliance was not an issue. Thus, the very district court cases out of the Northern District of Illinois which GMAC claims support its position do not. Further, in *Aronson,* the Court specifically held that there was no need for individualized hearings because of the standard form contract. Therefore, *Aronson* applied either a presumption or an inference of reliance.

To complicate matters further, the Fifth Circuit is in conflict with itself. The Court in *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970 (5th Cir. Tex. 10/27/00), in stark contrast to the *Perrone* Court, held that certifying a class should be done on a claim-by-claim basis rather than holistic basis in order to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members.

The *Bolin* Court addressed the issue of TILA authorizing an award to the class of actual damages and stated that unwinding various settlements or *refunding overcharges* (emphasis added) pursuant to an illegal reaffirmation agreement may not require calculating the damages of each class member; rather, proof of prior payment for the amount of damages would be predetermined. Nonetheless, computation of some components of actual damages (at p. 978) may require more individualized treatment, such as determining expenditures made by class members in defending against Sears' actions.

Thus, the *Bolin* Court, when confronted with TILA actual damage claims, determined that some would require individualized treatment and some would not. Tellingly, the *Bolin* Court indicated that "refunding overcharges" would be *predetermined* in contrast to those actual damages claims which may require more individualized treatment. The *Perrone* Court did not even consider the rote nature of the Petitioners' actual damage claims (an alleged uniform overcharge of $400) equivalent to the amount petitioners were charged for an upfront "acquisition fee" which was neither identified nor disclosed.

Likewise, GMAC's citation to *Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1 (1st Cir. 1981) only supports petitioners' contention that the circuits are in conflict. The *Bizier* Court held that the prophylactic design of TILA's private attorney general scheme required that liability be imposed. Appellants in that case had sought only the limited statutory remedy of Section 1640(a)(1) which was noted by the Circuit Court as providing a far less drastic and expensive remedy than might an award of actual damages under Section 1640(a)(2). The *Bizier* Court went on to hold in dicta that "in actions of the latter type, *such conventional contract-law elements as damages and causation must be shown in addition to a threshold showing of a violation of a TILA requirement* (emphasis added)." *Id.* at *4.

While the above quote is not binding, the First Circuit in *Bizier* had it right: actual damages claims under TILA should employ conventional contract law elements of damages and causation. In *Mourning*, Mr. Justice Douglas (with whom Mr. Justice Stewart and Mr. Justice Rehnquist concurred, dissented in part) citing Corbin on Contracts, expressed his view "that a proper resolution of the issue whether respondent extended credit to petitioner depends, at least in part, on the

contractual relationships between the respondent and the publishers." *Mourning* at p. 380.

Causation is not the same as detrimental reliance and should not be confused; nonetheless, the *Perrone* Court imposed a "but for" causation test, then equated it with the requirement of detrimental reliance. If *Bizier's* dicta were followed, then the Courts would employ conventional contract law elements for proof of damages and causation in an actual damages claim under TILA. Thus, the First Circuit has indicated a far different standard of proof regarding actual damages than the Fifth Circuit in *Perrone* and the Eleventh Circuit in *Turner*. Accordingly, the *Bizier* Court provides for more confusion and disharmony among the circuits, not less.

Clearly, any future TILA litigants seeking class certification of actual damages claims in the First Circuit would most assuredly cite to *Bizier* in support of a less stringent burden of proof than has been meted out in *Perrone* and *Turner*. For where agreements are supported by adequate consideration, there is no need to rely on notions of detrimental reliance. *See, FDIC v. Patel,* 46 F.3D 482 (5th Cir. 1995); *Mills v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 305 (8th Cir. 1983); Restatement (Second) of Contracts, Sec. 90 (1981).

The Eighth Circuit in *Peters* held that the proper analysis for determining actual damages was that the plaintiff had to show (1) that he read the TILA disclosure statement; (2) he understood the charges being disclosed; and (3) had the disclosure statement been accurate, he would have sought a lower price; and (4) he would have obtained a lower price but did no in-depth analysis as to why that was the rule. The dissent in *Peters* criticized the majority holding, and citing *Gibson,* stated that Judge Posner made it crystal clear a TILA

plaintiff need not show he would have sought and could have obtained a lower price on the dealer-offered service in order to state a claim.

GMAC also claims that the Sixth Circuit requires reliance, availing itself of the holding in *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000). In the *Stout* case, however, class certification was denied outright because of a finding that the discrepancies between plaintiffs and the ostensible class members ranged from the type of car, the degree of repairs necessitated, the response to those repairs, the purpose for which the car was purchased, the individual circumstances and transaction surrounding each purchase, including each class member's understanding of the terms and conditions of the purchase agreement and the extent of the injuries suffered, citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). The facts of *Stout* bear no resemblance to the facts of *Perrone*, where the only issue is GMAC's nationwide practice of non-disclosure of an "acquisition fee" of $400 in a standard form lease agreement, amounting to a several hundred million dollar overcharge.

Likewise, the recent decision *en banc* of *Turner v. Beneficial Corp.*, __ F.3d __ 2001 WL 172432 (11th Cir. 2001), decided since the time of the filing of the Petitioners' writ application herein, sheds no more light on the issue. The *Turner* Court simply regurgitated the holdings of *Perrone* and *Peters*, *supra*, and other district court decisions in support of its position. There was no rigorous examination of statutory construction principles and when it discussed legislative history, the *Turner* Court erred by giving any consideration to HR 193, 104th Congress, First Sess. 1995 as to the intent of Congress regarding "actual damages." The 1995 amendments to TILA did not amend or affect the actual damages provisions in any way. The remarks were simply

gratuitous. Congressional comments in 1995 as to how Congress intended the TILA actual damages provision to be implemented carries no significance whatsoever.

If any legislative history is to be reviewed, then the Court must look to S Rep. No. 720, 95th Congress, Second Sess. 12 (1978) and S Rep. No. 73, 96th Congress, First Sess. 13 (1979) regarding the agency enforcement provisions relating to restitution. The agency enforcement provisions were made retroactive to the date of enactment of actual damages and as such, were statutorily woven into the fabric of the civil liability section of TILA regarding actual damages. In a period leading up to the amendments, those two congressional committee reports explicitly stated that civil liability for actual damages was "the equivalent of restitution adjustments."

Turner and *Perrone* in error decertified the claims *in toto*, allowing no type of presumption or inference of reliance or proof of standardized reliance. There was no discussion as to Rule 23 implications or debate as to how claims of this nature would best be served by a class action. Both decisions glossed over the precise TILA statutory language these decisions rendered useless, superfluous and absurd, that being the TILA provisions which (1) mandate the courts to maintain class actions for actual damages and (2) provide that no consumer shall pay in excess of an amount actually disclosed. See paragraph following § 1640(a)(4) and § 1640(b). Furthermore, this Court in *Beach v. Ocwen Federal Bank,* 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed. 2d 566 U.S. (Fla. 1998), discussed interpretation of a clause in the TILA statute. "The section's uncompromising statement that the borrower's right *'shall expire'* (emphasis added) with the running of time manifests a congressional intent to extinguish completely the right of recision at the end of the three-year

period. There is no reason then even to resort to the canons of construction ..." Similarly, the language "shall consider" contained in the paragraph which follows § 1640(a)(4) evinces the same unequivocal congressional intent to maintain class actions for actual damages under TILA. The language cannot be interpreted in any other way.

GMAC also relies heavily upon the case of *McCoy v. Salem,* 74 FRD 8 (E.D. Mich. 1976) (as did the *Perrone* Court) which held that "while the statute itself and the legislative history both suggest that Congress intended actual damages as a class action remedy for Truth in Lending violation, this Court is convinced that the actual damage claims of class members must be resolved on an individual basis." That one sentence illustrates that the *McCoy* Court substituted its own opinion for the will of Congress, an act which this Court has time and again held impermissible.

In *Ford Motor Credit v. Cenance,* 452 U.S. 155, 101 S.Ct. 2239, 68 L.Ed. 2d 744 (U.S. La. 1981), this Court held that absent clear indication of legislative intent to the contrary, statutory language controls TILA's construction and, in addition, regulations promulgated by governmental body responsible for interpreting or administering statute are entitled to considerable respect, citing *Ford Motor Credit v. Milhollin,*444 U.S. 555, 567, 100 S.Ct. 790, 63 L.Ed. 2d 22 (U.S. Or. 1980), which held that TILA's statutory provision "signals an unmistakable congressional decision to treat administrative rule-making and interpretation under TILA as authoritative."

Likewise, in *Anderson Brothers v. Valencia,* 452 U.S. 205, 101 S.Ct. 2266, 68 L.Ed. 2d 783 (U.S. Ill. 1981), "as we emphasized in *Milhollin*, the task of striking the proper balance is an empirical process that entails investigation into

consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are better suited than the courts to engage in such process." 444 U.S. at 568-69, 100 S.Ct. at 798-99. *Anderson* held that by ignoring the Federal Reserve Board's definition of "security interest," the lower court erroneously relied on an unofficial staff interpretation which by its own terms was entitled to no weight whatsoever, an action which it had no right to do.

Petitioners assert that the *Perrone* Court's substitution of its own opinion regarding what importance a consumer may or may not attach to certain disclosures was erroneous, as well as its reliance upon *McCoy*. The Federal Reserve Board, in promulgating Regulation M, specifically 12 C.F.R. 213.4(g)(2), Official Staff Commentary and Model Lease Forms, deemed itemization and/or identification of up front fees paid by lessees important. The *Perrone* Court had no authority to second-guess Congress or the Federal Reserve Board.

Further, the *McCoy* Court, in addition to rewriting the TILA class action actual damages provision to its own liking, also directly contradicted this Court in *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 366-68, 93 S.Ct. 1652, 1659-60, 36 L.Ed. 2d 318 (1973). The *McCoy* Court held that TILA plaintiffs were not entitled to the presumption in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed. 2d 74 (1972) because "unlike 10(b)(5), the roots of Truth in Lending are not in protection against common law fraud." *McCoy*, at *13.

The logic of *McCoy* flies in the face of *Mourning v. Family Publications*. In *Mourning*, this Court found TILA's purpose to be two-fold: to facilitate the consumer's acquisition of the best credit terms available and to protect the consumer

from divergent and at times fraudulent practices stemming from the uninformed use of credit. *Mourning* at 363, citing HR Rep No. 1040, 9th Cong., 1st Sess., 13; S. Rep. No. 392, 90th Cong., 1st Sess., 1-2, 1967. The *Mourning* Court also recognized that when Congress originally enacted Truth in Lending, the use of consumer credit was expanding in an extremely rapid rate. Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of their credit obligations and of the cost of deferring payment because of the divergent, and at times, fraudulent practices by which consumers were informed of the terms of the credit extended to them. Congress was well aware from its extensive studies of the possibility that merchants could use devices to evade the disclosure requirements of the Act.

Therefore, it cannot be disputed that the roots of Truth in Lending, like the roots in 10(b)(5), are in protection against common law fraud, although TILA requires no proof of fraud in order to recover statutory or actual damages for disclosure violations. Thus, *McCoy* engendered an entire line of bad case law. If the Court in *McCoy* had simply followed the public policy dictates of *Mourning,* there would not be such a divergence of opinions regarding this important issue. Petitioners do not concede that detrimental reliance should not be an element of proof in order to recover TILA actual damages. However, It stands to reason that if TILA were enacted to combat fraud, then there is no reason not to apply the *Affiliated Ute* presumption. This Court has recognized that both TILA and 10(b)(5) actions have their roots in common law fraud. Further, if the issue is of concern to a trillion-dollar consumer finance industry, then the impact of this decision can be of no less importance to the millions of consumers who depend on legislation and the judicial system to protect them. For all these reasons, Petitioners' writ application should be granted.

Respectfully submitted,

/s/_____

Michael H. Ellis (La. Bar #5334)
George B. Recile (La. Bar #11414)
Paula Perrone (La. Bar #10518)
Chehardy, Sherman, Ellis,
Breslin & Murray
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
Telephone: (504) 833-5600

Wendell H. Gauthier (La. Bar #5984)
Scott Labarre (La. Bar #17659)
Gauthier, Downing, Labarre,
Beiser & Dean
3500 North Hullen Street
Metairie, Louisiana 70002
Telephone: (504) 456-8600

Jonathan B. Andry (La. Bar #20081)
Andry & Andry
710 Carondelet Street, First Floor
New Orleans, Louisiana 70130
Telephone: (504) 581-4334

Attorneys for Petitioners, Paul M. Perrone and Doris McCullough, Individually and on behalf of themselves and others similarly situated

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

[Filed January 19, 2000]

No. 99-30958

GILBERT V. ANDRY, JR., ET AL., ETC.,	)
Plaintiffs and Appellants,	)
	)
v.	)
	)
GENERAL MOTORS ACCEPTANCE CORPORATION	)
Defendants and Appellee.	)

Motion for Leave to File and
Brief of Amici Curiae
American Financial Services Association,
American Bankers Association, and
Consumer Bankers Association

In Support of Affirmance of an Order of the

United States District Court for the Eastern District of Louisiana, Northern Division (No. 97-2552)
Hon. Ivan L.R. Lemelle, Judge

GREGORY J. DIGEL
LAURIE WEBB DANIEL
HOLLAND & KNIGHT LLP
One Atlantic Center
1201 Peachtree Street,
N.W., Suite 200
Atlanta, GA 30309
Telephone: (404) 817-8500

MARK JOSEPH KENNEY
DONALD J. QUERIO
KIMBERLY A. KRALOWEC
SEVERSON & WERSON
A Professional Corporation
One Embarcadero Center,
26th Floor
San Francisco, CA 94111
Telephone: (415) 398-3344

Attorneys for Amici Curiae
AMERICAN FINANCIAL SERVICES ASSOCIATION,
AMERICAN BANKERS ASSOCIATION, AND
CONSUMER BANKERS ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The American Financial Services Association ("AFSA"), the American Bankers Association ("ABA") and Consumer Bankers Association ("CBA") respectfully request leave to file the attached Brief of Amici Curiae.

AFSA is the nation's largest trade association representing market-funded providers of financial services to

consumers and small businesses. AFSA's mission is "to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the responsible delivery and use of credit-related products." Organized in 1916, AFSA represents about 360 companies operating more than 10,000 offices engaged in extending $200 billion or about 15 to 20 percent of all consumer credit in the United States. AFSA's members include credit card issuers, independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies.[1] They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit.

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The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

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[1] Appellee General Motors Acceptance Corporation is an AFSA member.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The AFSA, the ABA and the CBA frequently appear as amici curiae in cases raising issues of widespread importance and concern to banks and the consumer finance industry.

The amici brief addresses the sole question of whether the "actual damage" provision of the Truth in Lending Act's civil liability section, 15 U.S.C. § 1640(a)(1), (which applies to violations of the Consumer Leasing Act, 15 U.S.C. §§ 1667 et seq., codified as a subchapter of TILA) necessarily includes a *reliance* component. The district court concluded that it does. Appellate resolution of this [page iii] issue will broadly affect the consumer finance industry as a whole, since it could dramatically widen the industry's exposure in all types of TILA litigation.

The AFSA, the ABA and the CBA wish to aid this Court in deciding this important question by presenting the consumer finance industry's perspective. The amici brief focuses on the legislative history surrounding the enactment and refinement of TILA's civil enforcement scheme, and the numerous decisions that cite that history in holding reliance

essential. The AFSA, the ABA and the CBA believe their perspective will shed additional light on the reliance issue.

So far, only district, bankruptcy and state courts have squarely decided the reliance question, all but one in favor of a reliance requirement. In dicta, the First Circuit has also found reliance essential.[2] Because of the importance of the issue, the AFSA, the ABA and the CBA urge this Court to accept their amici brief, which presents more detailed legislative history than the parties' briefs contain.

For all of these reasons, the AFSA, the ABA and the CBA respectfully request that their motion for leave to file an amici curiae brief be granted.

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[2] The Eleventh Circuit is considering the same issue in a pending case, *Turner v. Beneficial Corporation*, case no. 99-13381-F. On December 6, 1999, the AFSA, ABA and CBA moved for leave to file an amici curiae brief in that appeal as well. The Eleventh Circuit recently granted that motion.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed January 3, 2000]

No. 99-30958

GILBERT V. ANDRY, JR.; PAUL M. PERRONE; DORIS MCCULLOUGH, Individually and on Behalf of Others Similarly Situated	)
Plaintiffs - Appellants,	)
v.	)
GENERAL MOTOR ACCEPTANCE CORPORATION	)
Defendant - Appellee.	)

Appeal From United States District Court
for the Eastern District of Louisiana
Civil Action No. 97-2552
Hon. Ivan L. LeMelle, District Judge

APPELLEE'S BRIEF

* * * * *

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REQUEST FOR ORAL ARGUMENT

Due to the economic significance to GMAC of the issue presented by this appeal, GMAC requests oral argument.